ONTARIO

PROVINCE OF ONTARIO

REPORT OF THE ATTORNEY GENERALS' COMMITTEE

on

MEDICAL EVIDENCE IN COURT IN CIVIL CASES

ATTORNEY-GENERAL'S
DEPARTMENT
ONTARIO

DATE	ISSUED TO
Feb. 3/72	J. Hodson - Fraser, Beattie

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COMMITTEE

Hon. James C. McRuer, LL.D.
Former Chief Justice of the High Court of Justice for Ontario

William B. Common, Q.C.
Former Deputy Attorney General for Ontario

February 1965

THE HONOURABLE A. A. WISHART, Q.C.,
ATTORNEY GENERAL FOR ONTARIO,
PARLIAMENT BUILDINGS,
TORONTO 2, Ontario.

My dear Mr. Attorney:

By letter dated February 7th, 1963, the Honourable F.M. Cass, Q.C., the Attorney General for Ontario, appointed the undersigned a committee to consider and report upon means of facilitating the presentation of medical evidence in Court in civil cases.

Following this appointment your committee communicated with the Ontario Medical Association and the Law Society of Upper Canada, requesting that these organized professional bodies appoint committees to collaborate with and discuss the matters involved in the terms of reference with the members of your committee.

In response to this request the Law Society of Upper Canada appointed the following:

Joseph Sedgewick, Q.C.
G.A. Martin, Q.C. and
Brendan O'Brien, Q.C.

as a committee representing the Law Society of Upper Canada.

The Ontario Medical Association appointed the following committee to represent the medical profession:

Dr. R.J.M. Galloway,
Dr. W. Hurst Brown,
Dr. J.C. Richardson, and
Dr. Glenn Sawyer

Since the constitution of the latter Committee Dr. Fred A. Jaffe has been appointed to replace Dr. Brown, now deceased.

Your committee has had useful and constructive conferences with the committees representing the legal and medical professions and, in addition, has conferred with the Executive of the Ontario Hospital Association and their counsel Mr. Meredith Fleming Q.C.

The main object of the inquiry of your committee has been to determine:

(1) The most efficient means of having the medical condition of the plaintiff put before the Court in personal injury cases, and

(2) The production of medical evidence in Court with a minimum of interference with the professional services rendered to their patients by members of the medical profession who are called upon to give evidence.

Your committee has considered the practice in other countries with special attention to the following matters:

(1) Medical Reports

(a) Legislation authorizing reports of qualified doctors admissible in personal injury cases, subject to the reporting doctor being called as a witness at the request of either party.

(b) Compulsory exchange of all medical reports in personal injury cases.

(c) The appointment of an independent medical expert by the Court.

(2) Hospital Records

(a) The desirability of legislation providing that hospital records should be admissible in evidence as prima facie proof of the facts stated therein.

(b) The compulsory production of hospital records before trial.

(c) If either (a) or (b) are adopted, what steps should be taken to regularize the preparation of hospital records?

(3) Procedure to secure satisfactory medical evidence in malpractice actions.

With the co-operation of the Lord Chief Justice of England your committee conferred with representatives of the Bar, with solicitors representing the Law Society of England, with Dr. F. E. Camps and Dr. Michael Ashby, representing the British Medical Association. In addition, your committee visited the Courts in England and observed the presentation of medical evidence under the practice followed there. This practice will be discussed later in detail.

The practice in the State of New York of appointing an independent medical expert in personal injury cases, which has been adopted in varying degrees in some other states of the Union, has been made the subject of an intensive study. Your committee visited New York and held conferences with the administrator of what is known as the New York plan and with members of the Bench and officials engaged in its operation. Your committee also had a long conference with Dr. Howard R. Craig, the Executive Director of the Academy of Medicine of the State of New York, which participates in the operation of the plan. The procedure in New York will be fully discussed in detail.

One member of your Committee (Mr. McRuer) visited Los Angeles and San Francisco where attempts have been made to put the New York plan into operation.

Lengthy and useful conferences were held with members of the Bench, representatives of the practicing Bar and representatives of the medical profession.

Your committee wish to acknowledge the kindness and co-operation of the many members of the Bench, the Bar and the medical profession of other countries. Particular reference should be made to The Right Honourable Lord Parker of Waddington, Lord Chief Justice of England, Mr. E.J.T. Matthews, Under-Secretary of The Law Society and the members of the Solicitors' Committee associated with him, Mr. Patrick O'Connor, Q.C. of the English Bar and the barristers associated with him, Dr. Camps and Dr. Ashby, Judge Bernard Botein, Presiding Justice, Supreme Court Appellate Division, New York State, Administrative Judge Streit of the New York State Supreme Court; the Honourable Leland Tolman, Departmental Director of Administration of the First Department, Supreme Court Appellate Division, New York State, and Dr. Craig; Honourable P.S. Gibson, Chief Justice of the Supreme Court of California; Presiding Judge Kenneth N. Chantry of the Superior Court of California, Los Angeles; Presiding Judge Walter Carpeneti of the Superior Court of California, San Francisco, Judge Reginald I. Bauder of the Superior Court of California, Los Angeles,

Judge Emil Gumpert of the Superior Court of California, Los Angeles, Mr. John S. Malone, Assistant Secretary of the State Bar of California, Messrs. Frederick O. Field, Charles F. Forbes, Richard L. Oliver, Louis L. Phelps and E. D. Bronson of the Bar of California.

PART I

MEDICAL EVIDENCE

PRACTICE IN ONTARIO

Consideration of the matters referred to your Committee must necessarily be prefaced by an examination of the law of Ontario respecting the medical examination of plaintiffs in personal injury cases and the provisions for expert medical evidence.

The Committee of the medical profession were unanimous in their views that the law in Ontario is too restrictive and prevents a medical examiner on behalf of a defendant from making a satisfactory examination. They were also emphatically opposed to the view that a solicitor or his representative should have a right to be present while the examination is being conducted.

Under the common law the Court has no power to order a plaintiff to be medically examined: Street, J. in Reily v. City of London, et al., (1891) 14 P.R. 171.

As a result of the Reily case the following enactment was passed:

> "(1) In any action brought to recover damages or other compensation for or in respect of bodily injury sustained by any person, a judge of the court wherein the action is pending, or any person who by consent of parties or otherwise, has power to fix the amount of such damages or compensation, may order that the person in respect of whose injury, damages or compensation is sought shall submit to be examined by a duly

" qualified medical practitioner who is not a witness on either side, and may make such order respecting such examination and the costs thereof as he may think fit; provided always that the medical practitioner named in any such order shall be selected by the judge making the order, and provided moreover, that such medical practitioner may afterwards be a witness on the trial of any such action unless the judge before whom the action is tried shall otherwise direct."

Statutes of Ontario 1891, 54 Vict. c. 11.

This provision has remained on the statute books in substantially the same form since it was passed. Slightly amended and extended to include a dentist, it now forms section 75 of The Judicature Act, R.S.O. 1960, ch. 197, which reads as follows:

"75.-(1) In any action or proceeding for the recovery of damages or other compensation for or in respect of bodily injury sustained by any person, the court which, or the judge, or the person who by consent of parties, or otherwise, has power to fix the amount of the damages or compensation, may order that the person in respect of whose injury damages or compensation are sought submit himself to a physical examination by a duly qualified medical practitioner or by more than one duly qualified medical practitioners, but no medical practitioner who is a witness on either side shall be appointed to make the examination.

(2) The court, judge or other person may order a second examination or further examinations upon such terms as to costs as are deemed proper.

(3) Every such medical practitioner shall be selected by the court, judge or person making the order, and may afterwards be a witness on the trial unless the court, judge or person before whom the action or proceeding is tried otherwise directs.

(4) In this section, 'duly qualified medical practitioner' includes a person licensed to

"practise dentistry under the Dentistry Act."

In Clouse v. Coleman, (1895) 16 P.R. 496 at page 497, Falconbridge, J. restricted the examination provided for under the statute to touch and sight, leaving it to the examiner on an examination for discovery under the Rules to ask any questions that might be relevant to diagnosis.

Obviously it is not satisfactory for an examining doctor to have to rely on the questions submitted by counsel on an examination for discovery. Clouse v. Coleman has been followed with little extension ever since it was decided.

In Forbes, et al. v. Laycock, (1953) O.W.N. 813, the Senior Master, after stating that the examination provided for by the statute as now in force was by touch and sight, went on to say:

> "Therefore the doctor's activities being strictly limited to the matters mentioned, he is precluded from obtaining information respecting the plaintiffs from any other source, either other physicians or hospital records, without permission of the plaintiffs."

An order was made accordingly, forbidding the doctor who was authorized to conduct the examination to discuss the matter with any doctors who had treated the patient or to look at hospital records.

In Gilmour, et al. v. Kerry et al., (1943) O.W.N.

545, Mr. Conant, the Master, gave some guidance as to the nature of the discretion exercised by the Court. He said at page 546:

> "While the present law allows the Court a very wide discretion, it is a discretion that should be carefully exercised. The law should not be applied in such manner as to cause unnecessary inconvenience or embarrassment to parties by numerous examinations ... . But, while the Court will protect parties against the unnecessary embarrassment and inconvenience of numerous examinations, the Court will take cognizance of the fact that medical science has become highly specialized, and that in some cases, such as the present, a second or further examination by a specialist may be necessary to determine the condition and rights of the parties."

In Adischkewitz v. Booth, (1962) O.W.N. 203, the rule in Clouse v. Coleman was extended by the Senior Master when he made an order that the plaintiff submit to a neurological examination and answer questions in the absence of a solicitor. In making the order the Senior Master commented that Clouse v. Coleman was decided in an era when neurology was less advanced. However, in Larmond v. Nesbitt, (1962) O.W.N. 217, and Cohen v. Toronto Baseball Club, (1962) O.W.N. 231, orders for psychiatric examinations were refused.

Representations have been made to your Committee that Section 74 (75) of The Judicature Act should be amended to permit the Court to order psychiatric examinations

in proper cases. This will be discussed in due course.

A plaintiff has been ordered to submit to a blood test to determine whether the disability complained of was due to the accident in question or to other causes. The Master, in making the order, considered that it was necessary in order to ascertain "the very right and justice of the case": Johnson v. C.A. Ward Limited, (1946) O.W.N. 912.

The law of Ontario with respect to permitting a solicitor or his representative to attend on the medical examination being conducted on behalf of the defendant is authoritatively laid down by the Court of Appeal in Abbs, et al. v. Smith, (1943)O.W.N. 101. In that case the Master made an order for the physical examination of the plaintiffs by a physician named in the order and refused to order that the plaintiffs should be accompanied by a counsel or solicitor on the examination. On appeal Rose, C.J.H.C. varied the order of the Master so as to provide that the plaintiffs might be accompanied by a barrister or solicitor during the examination. The Court of Appeal refused to alter the order of the Chief Justice, holding that as the order was a discretionary one, the Court would not interfere.

In Nyomtato v. LeCrone Benedict Ways Incorporated, et al., (1946) O.W.N. 365, Wilson, J. held that while x-rays might be compelled to be produced on production of documents, the Master could not order them to be produced on making an order with respect to medical examination, under The Judicature Act.

In practice in Ontario the solicitors usually consent to one physical examination of the plaintiff by a physician nominated by the defendant. It is not unusual for the parties to agree to more than one physical examination. Sometimes solicitors for plaintiffs insist on being present at the examination being conducted on behalf of the defendant but this is not a general practice.

In addition to the statutory provisions referred to, Rule 267 of the Rules of Practice makes provision for the Court obtaining the assistance of experts. It reads as follows:

> "(1) The court may obtain the assistance of merchants, engineers, accountants, actuaries, or scientific persons, in such way as it thinks fit, the better to enable it to determine any matter of fact in question in any cause or proceeding and may act on the certificate of such persons.
>
> (2) The court may fix the remuneration of any such person and may direct payment thereof by any of the parties.

> "(3) Unless all parties are sui juris and consent, the powers conferred by this rule shall only be exercised by or by leave of a judge."

This provision is rarely, if ever, invoked for obvious reasons in personal injury cases.

PRACTICE IN ENGLAND

The practice of another country must always be considered in the light of the customs and traditions of that country and it must be borne in mind that a practice that may prove to be entirely satisfactory in one country cannot necessarily be adapted in another country with different customs and different traditions. Notwithstanding this, great benefit can be derived from an examination of the experiences of other countries with the same problems that arise in Ontario.

In England members of the legal profession have mitigated the inconvenience to the members of the medical profession who are called upon to give evidence in personal injury cases to a very marked degree. This has been done by the voluntary action of the members of the legal profession assisted by considerable pressure from the Bench.

In England a plaintiff cannot be compelled to submit to a medical examination as in the Province of Ontario. Notwithstanding that there is no power to compel a plaintiff to submit to a medical examination, it is the general practice for plaintiffs' solicitors to permit an examination at the request of the defendant, by arrangement. In addition, it is the general practice for solicitors to exchange medical reports and in most cases, unless there are special circumstances, the parties either agree on an "agreed" medical report or agree that the medical reports as made should be admitted in evidence without calling the author of the report. This is limited to cases where it is acknowledged that the medical report is made by a qualified medical practitioner but reports are accepted of medical practitioners who are qualified in other countries, although not qualified in England.

Lord Evershed's Committee on Supreme Court Practice and Procedure declined to recommend that the Court should have power to order a plaintiff to submit to a medical examination as he thought that it was "unnecessary in practice". Lord Evershed feared "To give such power might raise important

"questions of principle in relation to the liberty of the subject, and the power would seldom, if ever, be evoked." It was pointed out that where there was a voluntary submission conditions were usually attached that the plaintiff's medical adviser should be present at the examination. It was stated:

> "No objection has been made before us to this condition, which is generally welcomed by the party requesting the examination. The presence of the injured party's medical adviser is very often helpful to the medical examiner of the other party to the action."
>
> (Paragraph 349, page 116)

Under the English practice before a case is set down for trial an order is made by the Master in Chambers on a summons for directions. Much that is contained in this order is covered by the Ontario Rules of Practice. The specimen orders submitted to your committee contain a paragraph stating:

> "A medical report be agreed, if possible, and that, if not, the medical evidence be limited to witnesses for each party."

In dealing with this order for directions the following statement was made in the Evershed Report (page 117):

> "351. At present, in personal injuries actions the order for directions generally provides that, unless a medical report is agreed between the parties, the number of doctors to be called on either side shall be limited to one or two or, in exceptional cases, three. In most cases reports ought to be agreed but in many cases they are not, often because the defendant will not exchange

"his medical report for that of the plaintiff, and the plaintiff's advisers are not prepared to let the defendant's advisers see their medical evidence unless in return they see that of the defendant. As a result, the medical men engaged by each party attend the Court, though not all of them are necessarily called to give evidence. This leads not merely to the heavy cost of the medical witnesses attendance but sometimes to an injustice. The doctors for the plaintiff are very often called and cross-examined, and thereupon counsel for the defendant says that he will not dispute their evidence and does not call his medical witnesses. But the defendants may have gone to a specialist of greater ability and experience than the medical men called for the plaintiff; the specialist's diagnosis and prognosis may be the more accurate and also may be far more serious than that of the injured person's doctor. In such case the Court is deprived of that evidence and may be misled by the evidence before it."

"352. In these circumstances we think that each side should be compelled to disclose to the other the medical reports of any doctor whom he may desire to call at the trial; that is to say, we have it in mind that the recommendations which we have made in the last preceding Section of our Report with regard to the admission of expert evidence should apply also to the admission of medical evidence. This would mean that the medical evidence of any doctor would not be receivable at the trial unless a copy of his report had been produced to the advisers for the other party at least ten days before the trial or unless for special reasons the Court or a Judge should otherwise order before or at the trial."

"353. We would further give power to the Master on the summons for directions to order the exchange of medical reports with a view to agreement if possible. Any subsequent report received after the order for directions would have to be produced to the other side before it would be received in evidence. In our view this procedure would lead to

"many more medical reports being agreed and so save costs."

The recommendations contained in the Evershed Report were not adopted, but in practice the voluntary exchange of medical reports and efforts to agree on medical reports were greatly expanded. In 1962 a joint committee was set up consisting of representatives of the General Council of the Bar, the Law Society and the British Medical Association.

"To consider and report upon the whole question of the presentation of medical evidence to Courts of Law and tribunals including:

1. The gathering and availability of such evidence.

2. The availability of medical witnesses.

3. Questions of professional confidence."

A copy of this report is Appendix 1 hereto.

In referring to the recommendation contained in the Evershed Report from which we have just quoted the Joint Committee came to the following conclusions:

"22. Such a course would produce obvious advantages. By eliminating occasions when medical witnesses are called to testify about differences in their reports that are more apparent than real, much time and money could be saved. It would also remove the possibility of tactical surprise in these matters, which is of doubtful value in assisting the Court to arrive at a decision.

23. After careful consideration, the Joint Committee are unanimously agreed that, subject to what is said in para. 24 below, the Evershed Committee recommendation contained in para. 352 of the Report (quoted in Para. 21 above) has their full support.

"24. The qualification the Joint Committee make is this; the Evershed Committee make this recommendation in the context of a general recommendation in identical terms referring to expert evidence as a whole (paras. 290, 291 ibid.). The Joint Committee would be opposed to the implementation of the limited recommendation in regard to medical evidence in isolation, as this would create an exception to what is a general principle of English law that a party to proceedings is not obliged to disclose his evidence to the opposing party. The Joint Committee take the view, however, that this principle so far as it relates to expert evidence is one for consideration in relation to the whole field of expert evidence.

Joint Examination and Agreed Reports

25. The Committee is agreed as to the desirability of a joint medical examination in all cases where a medical examination is appropriate. There are, however, objections to joint consultation in the preparation of reports except by agreement of the parties or by order of the Court. It has been said that such a course would lead inevitably to suspicion of abuse or mala fides and would conflict with the principle that "justice must be seen to be done".

26. When the reports have been prepared they should be exchanged through the solicitors, which may result in their being agreed, and which in turn would obviate unnecessary attendance(s) at Court, and expense."

In considering these conclusions, the difference between the practice in Ontario and the practice in England must be borne in mind. In Ontario very wide discovery is permitted through examination for discovery and production of documents, while in England this is quite limited. The principle on which the Ontario law is based is that in order that the Court may reach a decision based on truth, both sides should

have ample opportunity to discover the case that is to be made out against the respective parties. Your committee is of the opinion that it would be undesirable under the system in this Province to depend only on sanctions in costs in order to obtain the desired result.

If the exchange of medical reports is made obligatory there should be some limited right of relief where in the opinion of the Court relief should be given. One side might submit a pro forma report or might be in default with respect to other matters in the action or there might be other circumstances that would warrant the Court in making an order excusing a party from producing his medical report. If this view is accepted an obligation will be placed on the medical profession to prepare the medical reports to be submitted to the Court in such a manner as not only to be clearly intelligible to the layman, but to avoid discursive discussion of facts that are quite irrelevant to the diagnosis or prognosis. Your Committee has no doubt that the legal profession is quite capable of instructing medical advisers how to prepare reports that would not be objectionable on any legal ground and at the same time would express in simple non-technical terms the expert medical opinion.

The practice in England of exchanging medical reports through the solicitors has promoted agreement on reports which in turn eliminates unnecessary attendances of doctors at Court with the resulting expense.

Your committee had the benefit of seeing the English practice in operation. No definite statistics are available to show to what extent medical reports are received without the attendance of medical witnesses. Some estimates were given that in only about 20 per cent of the cases would a medical witness be called. The Lord Chief Justice of England stated:

> " In almost all personal injury cases an interlocutory order is made that a medical report should be agreed if possible and if not agreed that the medical experts should be limited to one or in difficult cases to two experts on each side. The practical result is that in almost all cases except in those of great difficulty or where the damages are likely to be somewhat astronomical the Court is provided at the trial with an agreed medical report or reports. Indeed even when the doctors are not in complete agreement but where the parties do not wish to cross-examine, then the Court is invited to decide the case on reading the medical report or reports on each side. It is therefore comparatively rare for doctors to have to be present."

Your Committee was present at a trial conducted by Mr. Justice Salmon in which the injuries complained

of were very serious. The plaintiff who was a native of Switzerland was injured in an automobile accident in England. Before the accident the plaintiff held an executive position and was in receipt of a very substantial salary. It was alleged that by reason of the very serious head injuries sustained in the accident he could not, after his recovery, hold an executive position and had suffered a substantial change in personality. It was questionable as to whether he would ever be employable again. Twelve medical reports were exchanged and presented for the consideration of the Court. Five of these were presented as agreed reports and one as an agreed report with the exception of two paragraphs. These reports, which are attached hereto as Appendix 2 give a very clear indication of the type of report that is received by the English Courts. The fact that the reports were accepted to the extent that they were without the attendance of their authors made it unnecessary for three medical practitioners to come from Zurich to London. The manner in which the medical evidence was presented was very impressive. A copy of the medical report was handed to the Judge and read by counsel. Where the doctors were called as witnesses, each witness was merely asked to explain any matters that might not be clear in the report either to the

Court or to counsel. The examination of each medical witness lasted a very short time and what would otherwise have been a very long trial was disposed of within less than a day and a half.

In other cases observed, through the exchange of medical reports and the submission of the reports to the Court the time consumed in the presentation of the medical evidence was reduced to a minimum. At the same time counsel had a greater opportunity to emphasize the material in the respective reports that he felt should be drawn to the attention of the Court than is the case where the medical evidence is given orally.

Through the courtesy of Mr. E. J. T. Matthews, Under-Secretary of The Law Society, your Committee was furnished with specimen correspondence in two personal injury cases. This demonstrated how far the profession in England have been able to develop a voluntary system of agreed medical reports and the submission of evidence by way of medical aspects without calling the authors of the reports.

In case A the solicitors for the defendant wrote to the solicitor for the plaintiff on the 14th May, 1963, inquiring whether he had medical reports to submit for agreement and stating that if he did not have an up-to-date report they should like to have the defendant's medical expert examine the plaintiff

again. On the 16th May the solicitor for the plaintiff wrote to the solicitors for the defendant, stating that he was willing to exchange medical reports with a view to reaching agreement and asking that he be sent a copy of the defendant's report. On the 20th May the defendant's solicitors sent two medical reports made by their medical expert and requested that the plaintiff's medical reports be furnished to him, stating - " It may be, of course, that reports can be agreed." On the 22nd May the solicitor for the plaintiff wrote to the solicitors for the defendant, sending copies of two reports submitted by his medical expert. On the 17th June the solicitors for the defendant wrote to the solicitor for the plaintiff stating that they were prepared to agree that the plaintiff's medical reports should be treated as agreed medical reports. The reports agreed to are attached hereto as Appendix 3. The result was that no medical witness appeared at the trial.

The manner in which the matter of medical evidence is dealt with in England is well demonstrated in another case by reference to the following extracts from the correspondence:

To Messrs. J--M-- & R-- From W. H. T. dated 8th May, 1962.

" . . . On the question of medical evidence, I am quite prepared to exchange medical reports, but in view of the severity of the injuries I would like at least one of my doctors, probably a physician, to be at Court . . ."

From Messrs. J--M-- & R-- To W. H. T. Dated 14th, May, 1962.

" . . . We note that you propose to call your Specialist in any event and in the circumstances, therefore, we are wondering whether it is possible for us to agree the Orthopaedic medical reports: we have had no up-to-date report but we enclose herewith our report of the 31st October 1960 and await hearing from you with copies of your reports . . ."

To Messrs. J--M-- & R-- From W. H. T. Dated 10th July, 1962

" . . . I enclose copies of Mr. Gilbert Parker's reports.

I cannot discern there is a great deal of difference between Mr. Parker and Mr. Leitch but Mr. Parker's reports are considerably more up-to-date and I suggest that they alone be read to the Court as agreed . . ."

From Messrs. J--M-- & R-- To W. H. T. Dated 11th July, 1962

" . . . We thank you for your letter of the 10th inst. enclosing a copy of Mr. Gilbert Parker's reports.

We are quite happy that they should be read to the Court there being no necessity to refer to the Report of Mr. Leitch. . ."

From Messrs. J--M-- & R-- To W. H. T. Dated 1st August, 1962

" . . . We should like to have your Client re-examined by Dr. T. M. Cuthbert prior to

"the Hearing at the Assize and we should be obliged if you will confirm that there is no objection to this and if you would instruct your Client to keep any appointment notice of which he may receive from Dr. Cuthbert. You will appreciate that our last medical report is dated 18th December 1961."

Copies of the medical reports referred to therein are Appendix 4 hereto.

There is no doubt the Bench has taken an active part in promoting the submission of medical reports without calling the medical witnesses for examination or cross-examination. The case of Dalton v. Clark & Fenn Ltd. was reported in the London Times on July 19th, 1963. The case was presided over by Mr. Justice Glyn-Jones . The following is an extract from a report of the case:

" Mr. William Denny appeared for Mr. Dalton; Mr. P.H. Ripman for Clark & Fenn Ltd.

Mr. Denny referred to the injuries sustained by Mr. Dalton.

HIS LORDSHIP -- Have medical reports been exchanged?

Counsel -- Regretfully, no. Attempts to agree have been made earlier on. Medical evidence will be called on both sides.

HIS LORDSHIP. -- Is there any reason,in the name of common sense, why medical reports should not be exchanged?

He (his Lordship) strongly deprecated this business of keeping medical reports up one's sleeve, and took the poorest view of any

> " obstructive attitude in regard to medical reports, particularly where insurance companies were concerned. It ought to be the pride of insurance companies to pay the proper sum and not to try to cut down the plaintiff's damages by a forensic device like catching him unawares. The proper course, in these cases in his Lordship's judgement, was that the plaintiff should hand over his medical reports on the terms that, if they were not agreed, he should be entitled to know why - that is he should see the defendant's medical reports. His Lordship would like to see that as part of the rules of court."

His Lordship went on to comment:

> " I am very impressed by the mischief of summoning busy physicians and surgeons from their proper work."

He pointed out that when medical men meet they have no difficulty in reconciling their differences of opinion appearing on the faces of their respective reports. His Lordship also commented that he would try to deal with any such situation in his order for costs if satisfied that the Plaintiff had made it difficult for the Defendants to see hospital notes.

PRACTICE IN THE UNITED STATES OF AMERICA

For many years there has been much criticism emanating from both the legal and medical professions in the U.S.A. with respect to the presentation of medical evidence in Court. The criticism has been

directed particularly to allegations of bias and incompetence on the part of medical witnesses. In the foreward to the record of a symposium on expert testimony published in the 1935 edition of Law and Contemporary Problems, vol. 2, page 401 (Duke University) it is stated:

> " Contemporary the problem of expert testimony is, but new it most certainly is not. For the past half century - to ignore earlier manifestations of discontent - the common law method of eliciting expert opinion in the trial of cases has been a target of criticism by the scientists whose testimony has been sought.
> . . .
>
> Today, as at no previous time, there seems evident a determination on the part of both the Bar and the scientific professions to put an end to 'the battles of experts' which have aroused the cynical scepticism of the public as to the integrity of both groups. Accordingly, it has seemed appropriate to present a survey of the progress that has been made and of the problems that remain for solution."

Doctors Elliott and Spillman in dealing with "Medical Testimony and Personal Injury Cases" (Vol. 2, Law and Contemporary Problems, 1935, page 466) quoted from an address given by Dr. J. W. Courtney to the graduating class of Harvard Medical School in 1915, as follows:

> " ... The army of witnesses on either side is generally appalling. Of these the medical ones alone concern us. They are of two hostile camps, and prepared to attempt, under solemn oath, to

" uphold opinions diametrically opposed, yet supposedly derived from a single series of facts and observations.

The situation is a deplorable one, and nobody discerns the glaring wrong of it all with clearer vision than certain high-minded men from our ranks, who have long striven to procure legislative enactment looking toward the abolition of this evil."

A list of articles that have been written on the problem of medical expert evidence from 1900 to the end of the 1930's will be found in footnote (2) of Wigmore on Evidence, vol. 2, 3rd edition, 1940, at page 645. The learned author states at page 646:

" The principal feature of the breakdown seems to be the distrust of the expert witness, as one whose testimony is shaped by his bias for the party calling him. That bias itself is due, partly to the special fee which has been paid or promised him, and partly to his prior consultation with the party and his self-committal to a particular view. His candid scientific opinion thus has had no fair opportunity of expression, or even of formation, swerved as he is by this partisan committal."

At page 647 reference is made to this statement of Lord Macmillan in "Law and Other Things", (1937) at page 250:

" ... I am prepared to pay tribute to the fairness which they in general exhibit. But the witness-box is a difficult place for the scientific man to occupy. It is wrong for him to be an advocate, and the contentious atmosphere of the courts is not always conducive to the calm and dispassionate exposition of truth ... Of one thing I am certain, and that is that no scientific man ought ever to become the partisan of a side; he may be the partisan of an opinion in his own science, if he

"honestly entertains it; but he ought never to accept a retainer to advocate in evidence a particular view merely because it is the view which is in the interests of the party who has retained him to maintain. To do so is to prostitute science and to practise a fraud on the administration of justice."

Professor McCormick, in his "Handbook of the Law of Evidence", (1954), stated at page 34:

" In common law countries we have the contentious or adversary, system of trial where the opposing parties, and not the judge as in other systems, have the responsibility and initiative in finding and presenting proof. Advantageous as this system is in many respects, its present application in the procurement and presentation of expert testimony is widely considered a sore spot in judicial administration. There are two chief points of weakness. The first is the choice of experts by the party, who will naturally be interested in finding, not the best scientist, but the 'best witness'. As an English Judge has said:

> '... the mode in which expert evidence is obtained is such as not to give the fair result of scientific opinion to the Court. A man may go, and does sometimes, to half a dozen experts ... He takes their honest opinions, he finds three in his favour and three against him; he says to the three in his favour, "Will you be kind enough to give evidence?" and he pays the three against him their fees and leaves them alone; the other side does the same ... I am sorry to say the result is that the court does not get that assistance from the experts which, if they were unbiased and fairly chosen, it would have a right to expect.' (Jessel, M.R. in Thorne v. Worthington Skating Rink Co., L.R. 6 Ch.D. 415, 416 (1876)).

" The second weakness is that the adversary method of eliciting scientific testimony, by direct and cross-examination in open court, frequently upon hypothetical questions based on a partisan choice of data, is ill-suited to the dispassionate presentation of technical data, and results too often in over-emphasizing conflicts in scientific opinions, which a jury is incapable of resolving."

These views with respect to the experience in the Courts of the United States with regard to expert medical evidence are by no means isolated comments of a few authors. Mr. Justice Peck, then presiding Justice of the New York Supreme Court, Appellate Division, First Department, stated in the American Bar Journal, October 1956, Vol. 42, page 931:

" (Doctors) are selected not for their medical qualifications or their objectivity but principally for their personality and manner of testifying, their jury appeal. When, as often happens, the medical views expressed at the trial are as one-sided and far apart as the parties' differences as to how the accident happened, the jury is left hopelessly confused."

Judge Niles, Chief Judge of the Supreme Bench of Baltimore City, stated in the Delaware State Medical Journal, October 1957, vol. 29, page 247:-

"Expert opinions do not always diverge to the extent of 100 per cent. But opinions expressing differences as great as between 30 per cent and 70 per cent; 15 per cent and 85 per cent; or 'substantial' and'minimal' are heard every day."

Mr. Justice Bernard Botein, Presiding Judge of the Appellate Division, Supreme Court, First Divisional Department, New York, stated at a meeting of

the Section of Judicial Administration of the American Bar Association in March 1959:

> " The court room picture is further complicated by the fact that, in New York city at least and in many other large cities, both sides rely to a large extent on testifying experts,- doctors who examine the plaintiff not for treatment or diagnostic purposes, but only for the purposes of litigation. These men appear in court frequently, as opposed to the average physician, who loathes and dreads court appearances; and they have all developed effective court room manners. Often they have examined the plaintiff for the first time the night before they testified."

As a result of the prevalent conditions in the United States Courts several plans have been advocated and some put into effect with the object of providing for the Court what is referred to as "impartial medical testimony".

Doctors Elliott and Spillman in their article in Law and Contemporary Problems, at page 466, advocated a system of medical assessors not dissimilar to the practice followed in the English Admiralty Courts. It was suggested that the personal injury cases should be heard by a tribunal of two or three Judges, one Judge to be the Judge of law and to pass on the law and liability; the second Judge to be a qualified medical practitioner; and in some cases a third Judge, who would be a layman. The second Judge would adjudicate on questions as to the causal relationship between

the defendant's act and the injury for which the plaintiff sought damages. In the cases requiring a third Judge a lay point of view would be represented with particular reference to industrial accidents.

In Wigmore, vol. 2, 3rd edition, at page 648, a method used in Continental countries is mentioned , but disapproved, - that is, the appointment of only official experts as witnesses to take the place of paid partisan experts employed by the respective parties and it is suggested that the latter should be abolished.

Neither of the proposals made by Drs. Elliott and Spillman, nor the one mentioned by Wigmore, could be adopted in the United States of America because of constitutional difficulties. Wigmore suggested that the Court should be authorized to call on any issue an expert selected by the Judge himself in addition to experts called by the respective parties and the learned author suggested this procedure:

"(a) The judge's power should be exercised after notice by him to the parties so as to encourage an agreement upon a selected name;

(b) The official expert should be allowed to draw up his statements in the form of a report, and to read this in the first instance as his testimony.

(c) The Judge should be authorized to require a conference before trial between the Court expert and all the other experts intended

" to be summoned, so as to reconcile beforehand needless misunderstandings ...

(d) The official expert should of course be subject to cross-examination, if desired, by the parties.

(e) The State should pay the expert's special fee.

Model Expert Testimony Act.

In 1937 the principles suggested by Wigmore were embodied in a Model Expert Testimony Act, drafted by the National Conference of Commissioners on Uniform State Laws. For particulars of the Act see Wigmore, vol. 3, pages 651 to 655. Under this Act the Judge would be allowed in any case (not necessarily a personal injury case) to appoint an expert witness (not necessarily a doctor) to report and testify. The appointment would be made only after hearing the parties as to the desirability of such a course of action and the expert chosen would be selected by the Judge only after the parties could not agree on the appointment.

At the trial the Court or any party would be empowered to call any expert witness appointed by the Court. The fact that he has been appointed by the Court would not be made known to the jury and he would be subject to cross-examination by any party on his qualifications and the subject of his testimony. Any party to the proceedings might call other

expert witnesses upon reasonable notice being given to the Court and the adverse party of the name and address of the expert to be called. The compensation of the Court-appointed expert would be paid in equal proportions by the opposing parties and charged as costs in the case.

The Model Expert Testimony Act has only been adopted in one jurisdiction (South Dakota). In a report of a special committee of the Association of the Bar of the State of New York on the subject of impartial medical expert testimony published in 1956, the committee gave this view of the lack of popularity of the Act, at page 11:

> "Perhaps too much emphasis is placed upon the desires of the litigants, some of whom are likely to be unable or unwilling to assume the financial burdens involved. Also, because of the generality of the scope of the proposal, realistic implementation is lacking. For example, panels of experts are not made available for appointment, nor are judges informed as to how and where they may find the men they seek."

Minnesota Plan

Since 1960 there has been in existence in the State of Minnesota a plan whereby the testimony of a doctor at a trial may be subsequently reviewed by a committee on medical testimony composed of doctors. Under this plan a Judge, attorney or physician who considers that a doctor has filed a report or given

testimony that was unduly partisan may complain in writing to the Committee. The committee of six members reviews the transcript which is obtained at the expense of the State Medical Association and calls upon members of various specialties to appear before the committee and express their opinion regarding the testimony in question. The committee has no disciplinary powers or judicial powers but does have the ability to refer cases to the State Board of Medical Examiners which has the power to suspend or revoke a doctor's licence.

The Minnesota Plan does not regulate the procedure at a trial with respect to the use of expert testimony but it is intended to correct any abuse by physicians of their function as medical experts testifying on behalf of either party. In an article appearing in the Journal of the American Medical Association (April 14, 1956, at page 1334) this statement is made:

> "The Minnesota Plan was initiated in 1940 ... thereafter the Illinois State Medical Society, the Kansas Medical Society, the Chicago Medical Society, and the Harris County Medical Society (Texas) established committees patterned after the Medical Testimony Committee in Minnesota; however, these committees, in general, have not been successful. In addition to the above, the Louisiana State Medical Society and the Wisconsin Medical Society have worked with their State Bar Associations in connection with the review of medicolegal testimony.

> The Medical Disciplinary Board Act of Washington provides for the review of medical testimony by the disciplinary board."

New York Medical Expert Testimony Plan.

The best developed plan for obtaining impartial medical testimony is in operation in New York County. This plan was established in December 1952. It was put into operation by means of a "Special Rule" of the Appellate Division of the Supreme Court of New York County. New York County embraces Manhattan only. On October 1, 1953, the plan was extended to the Supreme Court of Bronx County. The Rule establishing the plan reads as follows:

> "1. There is established in the Supreme Court for the County of New York an office to be known as the Medical Report Office, which shall be in charge of a deputy clerk of the Supreme Court.
>
> 2. In any personal injury case in which, prior to the trial thereof, a justice shall be of the opinion that an examination of the injured person and a report thereon by an impartial medical expert would be of material aid to the just determination of the case he may, after consultation with counsel for the respective parties, order such examination and report, without cost to the parties, through the Medical Report Office of the Supreme Court, New York County. The examination will be made by a member of a panel of examining physicians designated for their particular qualifications by the New York Academy of Medicine and New York County Medical Society. Copies of the report of the examining physician will be made available by the clerk of the Medical Report Office to all parties.

"3. If the case proceeds to trial after such examination and report, either party may call the examining physician as a witness or the trial justice may, if he deems it desirable to do so, call the examining physician as a witness for the court, subject to questioning by any party, but without cost to any party."

As will be indicated later, this plan has formed the foundation for other plans in several jurisdictions in the United States of America. The procedure followed in the operation of the plan is set out in detail in the report of the Special Committee of the American Bar Association to which we have already referred. This procedure may be summarized as follows:

(a) Selection of Experts -

The Justices of the Supreme Court of New York County indicated the branches of medicine where they thought expert testimony was most required, and how many doctors they thought were needed in each branch. The local medical societies compiled panels of specialists and requested the men named upon them to serve. As of the date of the New York Report, 15 panels of specialists were in existence. Each panel ranged in number from as many as 15 men (orthopaedics) to a panel consisting of a single doctor (malignancy and trauma). Care was taken in the selection of physicians to ensure that none chosen had been prominently identified with

either plaintiffs or defendants in personal injury litigation. The following are the panels established with the number of doctors available on each panel set out in brackets after the panel name:

> General surgery (7); plastic surgery (4); ophthalmology (3); cardio-vascular diseases (5); dermatology (3); tuberculosis (4); internal medicine (5); neurosurgery (100); neurology (6); psychiatry (4) neuropsychiatry (6); roentgenology (9); orthopaedics (15); otolaryngology (4); obstetrics and gynaecology (5); genitourinary diseases (4); malignancy and trauma (1); and endocrinology (2).

(b) Referral of Cases By Judge to Panel Expert

The Judge conducting a pre-trial conference explores with the lawyers for both sides the issues in the case and the possibilities of settlement. He usually has before him at this time medical reports by the doctors for both sides, and where the plaintiff has been hospitalized, hospital records. If it appears that there is a sharp dispute as to the nature of the injuries suffered by the plaintiff, and if it

appears to the Judge that a report by an impartial expert would be helpful, he makes an order referring the case to such an expert. In the order, the Judge describes the nature of the medical dispute and indicates the type of specialist who is needed to examine the plaintiff. He also fixes a date for a resumed pre-trial conference when the case will again be discussed in the light of findings by the impartial expert.

Counsel for both parties proceed to the Medical Report Office where the clerk examines the order and consults his files and selects the appropriate specialist. Doctors are called in rotation as much as possible. Their names are kept confidential, so that there will be no opportunity or temptation for the lawyers to seek the services of any particular doctor. The clerk then arranges an examination with the doctor selected. The parties submit in advance of the examination all medical records that they have pertaining to the case. In the event that hospital records have to be examined, they are subpoenaed to be sent directly to the doctor's office. The subpoena is approved by the clerk of the Medical Report Office.

(c) Conduct of Impartial Examinations

The examination of the impartial expert follows in general the pattern of an ordinary physical examination where the relationship between doctor and patient is private. The expert has the right if he so desires to exclude counsel. The patient recounts his ailments and his medical history; the doctor then makes his examination, using such tests and laboratory procedures as he deems necessary; and finally the doctor makes his diagnosis and prognosis. After conducting the examination the doctor forwards three copies of his report, together with his bill, to the Medical Report Office.

(d) Use Of The Reports

Upon receiving the report, the clerk at the Medical Report Office retains one copy for use of the Judge, and sends the other two copies to the attorneys involved. The copy for the Judge, along with the doctor's bill, is retained with the other records in the case, ready to be presented to the Judge when the resumed pre-trial conference is held. At the resumed pre-trial conference, the lawyers and Judge discuss the

case again in the light of the impartial report or reports. Again settlement is discussed; and effected if possible. It may be that both attorneys agree that the injuries are not serious enough to warrant keeping the case in the Supreme Court. In that event, with consent of all parties, it may be transferred to a lower court; the judge at this stage of the proceedings also passes upon the bill rendered by the impartial expert.

(e) Testimony in the Event of Trial

If the case later goes on to trial, the impartial expert may be called to testify. He need not be called, however, unless one of the attorneys or the trial Judge desires to examine him as a witness. If he takes the stand, the customary procedure is for the attorney who requested his presence to qualify him as an expert (including his identification as a member of the expert panel) and thereafter his examination proceeds in much the same manner as the examination of any other expert witness. He may be cross-examined by the opposing attorney and further questions may be put to him by the Judge. Sometimes the written report of the

impartial expert is received in evidence by consent of both sides. After the case is concluded, the impartial expert renders his bill for testifying. Upon approval by the trial Judge it is paid out of public funds from the Court budget.

Between December 1952 and June 30, 1958, 661 cases were referred to the Medical Plan; 345 originated as a consequence of referrals by a Judge presiding over a pre-trial conference; 133 were referred by the Judges who make the assignment of cases to the particular Judges who hear the case; 76 were referred by the Judge sitting at trial and the remaining 107 arose from various sources. Of the cases referred 50 per cent (290) were settled before trial and after the reference; 101 were settled after trial assignment. Only 62, or 11 per cent of the cases were concluded by a verdict of the jury, or judgment. The remainder disappeared from the calendar for unclassified reasons.

The number of cases referred on pre-trial conference decreased from 105 in 1953 to 43 in 1957. Your committee has been advised by the officer in charge of the Medical Report Office that the following is the record of the referrals in the years

1960 to 1963:

Year	No. of Referrals
1960	88
1961	146
1962	241
1963	175

The medical specialists and the panel have been instructed to charge fees appropriate to patients in moderate circumstances, taking into account the element of public service involved. Fees for individual examinations have ranged between less that $20.00 for simple x-rays to as much as $200.00 for a few of the more elaborate and difficult assignments, depending on the specialty involved and the complexity of the case. Most of the fees range from $50.00 to $150.00. Your Committee was impressed with the modest fees of the impartial specialists.

In only 76 of the 661 cases referred from the inception of the scheme until June 30, 1958, have the medical experts who performed the examinations been called as witnesses at the trial.

The Honourable David W. Peck, former Presiding Justice of the Supreme Court of New York, speaking at the American Bar Association convention in August 1958 summarized the benefits derived from the panel as follows:

1. It contributed to a major extent in

effecting the settlement of a large number of the toughest cases, those which could not have been settled by ordinary pre-trial procedures and efforts, and would have taken longer than the usual case to try.

2. The panel brought light into the cases which were tried as well as into the cases which were settled.

3. The panel has had a wholesome prophylactic effect upon the formulation and presentation of medical testimony in Court. Although the panel is not used in most cases, Justice Peck was of the opinion that the knowledge that it may be used, that the reports and testimony of the parties' doctors may be checked by a member of the panel, has induced greater care and responsibility in the selection of experts and in their examination and reports.

4. The doctors who have observed the panel in operation have concluded that it has made an important contribution to the improved medical handling of cases, in the diagnosis and treatment of injuries as well as in the presentation of medical proof in Court.

This fourth benefit arises out of the fact

that the specialists, in overseeing the diagnosis of both the plaintiff's and defendant's own physicians, are able to point out errors and omissions in the conduct of the original examinations. In other words the medical panel specialists serve as a source of enlightenment and knowledge to the appropriate procedures to be employed.

Sanctions

The sanctions available to the Court under the New York Plan may be quite severe. If either party fails to submit to the order of the Court the action may be dismissed or, on the other hand, judgment go in favour of the plaintiff.

Criticism of New York Plan

The New York plan has been extensively criticized on the following grounds:

(a) The identification of the impartial Court-appointed expert as such before the jury vests the expert in a cloak of infallibility, thereby unduly swaying the jury, and depriving the parties of their constitutional right to trial by an impartial jury.

(b) Medical science is uncertain and subject to human error. Therefore the opinion of the

impartial expert is no more authoritative than the opinion of a partisan expert.

(c) There are two schools of thought on many problems in medicine. Thus the determination of an issue will depend on the chance selection of the court expert by the rotation method employed in selecting doctors on the panel.

For an elaboration of these criticisms reference may be made to the following articles and editorial material:

Elwood S. Levy, of the Bar of Philadelphia:
"Impartial Medical Testimony -Revisited"
34 Temple Law Quarterly, 416 at page 424;

Thomas F. Lambert, Jr.:
"Impartial Medical Testimony: A New Audit",
20 NACCA Law Journal, 1957, page 25;

Honourable Walter R. Hart, a Judge of the New York Supreme Bench: reported in
"The Plaintiff's Advocate", Vol. 2, No. 7,
October 1958, page 20;

Professor Samuel Polsky:
"Expert Testimony: Problems in Jurisprudence"
34 Temple Law Quarterly, 357.

In 1956 the Judicial Administration Section of the Americal Bar Association submitted a resolution to the 1957 Annual Meeting of the American Bar Association, recommending that the Association adopt a programme of fostering the creation and employment of panels of impartial medical experts, under Court aegis, in the pre-trial consideration and the trial

of personal injury cases, especially in those communities where there was a volume of personal injury litigation in the Courts and where there was a sufficient number of qualified doctors available to constitute a panel. The resolution was adopted by the House of Delegates at the 1957 annual meeting.

In 1961 the House of Delegates of the American Medical Association passed a resolution endorsing the principle of non-partisan medical testimony. The American Bar Association and other national Bar and judicial organizations, who were interested, were invited to participate in the formulation of a model plan for non-partisan medical testimony. Mr. Levy in his article (34 Temple Law Quarterly, at p. 419) states that the plan for non-partisan medical testimony has been rejected by the Maryland Bar Association, the Baltimore City Bar Association, the Medical-Legal Committee of the Philadelphia Bar Association and the District of Columbia section of the American Bar Association on judicial administration.

In the same volume of the Temple Law Quarterly at page 394 Judge Van Dusen sets out a list of articles written by Judges who have operated under such a plan and who approve of it in principle.

In 1961 the editors of the Temple Law Quarterly

forwarded a questionnaire with reference to the use of impartial medical testimony to various jurisdictions throughout the United States. From replies received considerable information was compiled concerning plans which had not gained as much public notice as the original New York plan. A discussion of these plans will be found in volume 34 of the Temple Law Quarterly, page 476. It is unnecessary to deal elaborately with the variations of these plans. Appendix 5 shows some of the variations as adopted in Philadelphia, Chicago, Baltimore, Utah, Cleveland and Los Angeles. These plans are all based on the New York plan, and unless the principles of the New York plan can be applied in Ontario, your Committee does not feel that any of the variations adopted in other States of the Union could be made to operate satisfactorily in Ontario.

Comments on New York Plan.

Your Committee is convinced that the New York plan for impartial medical testimony can only be made to operate satisfactorily under conditions similar to those existing in New York County and the Bronx, where there are many medical schools and hospitals. In these two areas there is the heaviest concentration of population on the North American continent. In addition, there is available a very large

body of highly qualified medical practitioners. Under these circumstances panels selected by the executive director of the Academy of Medicine consist of Professors of Medicine or those of equal standing. In view of the numbers available, the burden cast on the members of the panels is comparatively light. In Metropolitan Toronto, with a population of about 1,250,000, and one Faculty of Medicine, and comparatively few hospitals, the number of qualified experts in each of the respective fields who would be free to have their names placed on panels similar to those used under the New York plan would necessarily be quite limited.

In New York one of the features of the system is that the panellists are largely anonymous, that is, the parties do not know what member of the profession may be selected and as there are so many on the panels their services are infrequently required. In circumstances existing in Toronto those available as panellists would be well-known to the legal and medical profession and the benefits of anonymity would be lost.

The New York system does not operate outside of Metropolitan New York, and for reasons that are obvious the New York system could not be made to

operate at all outside of Metropolitan Toronto.

The New York Medical Expert Plan is based on a practice and procedure in the Courts that is very different from that of Ontario. In New York an action is not commenced by writ but by a process of making a claim and the matter does not come before the Court until all the preliminary steps have been taken, including examinations. When the case is said to be ready for trial it is certified for trial and entered upon the calendar.

In a personal injury case, before the plaintiff is permitted to place his case on a calendar he must make himself available for examination by doctors representing the defendant and, in return for making himself available for examination he must be furnished with a copy of the report of the doctor who examines him. He must also make available his own doctor's report and his hospital records or authorize the defendant's doctor to have the same right of inspection of the hospital records as the plaintiff's has. After cases have been entered upon the calendar, pre-trial conferences follow. These are for the purpose of endeavouring to get the parties to agree upon settlement and if they cannot agree to obtain an agreed statement of fact where possible.

Your committee witnessed the conduct of one of these

pre-trial conferences in New York. It consisted first of representations by the plaintiff's counsel, stating the amount demanded and his version of how the accident in question happened. The defendant's counsel made representations as to his version of how the accident happened and contended that the defendant was not liable. The presiding Judge remarked that the parties were $50,000 apart so that the matter was adjourned for another conference. There may be several of these pre-trial conferences before the case is put on the trial calendar. It is only when no settlement is arrived at as a result of the conference and there appears to be continuing disagreement between the doctors as to the injuries, that either of the parties may apply to a Judge to have an independent medical expert appointed.

Procedure in California

In Los Angeles County an attempt has been made to develop an impartial medical testimony plan similar to that operating in New York. Mr. John S. Malone, the Assistant Secretary of the California State Bar Association, was most helpful in arranging conferences for a member of your Committee with members of the Bench and Bar in California.

The rules with respect to independent medical

testimony have been made by the Judges and they are very closely related to the pre-trial procedure. There are three stages through which cases pass all of which are dealt with by the Judges. In the first instance, either party may request a settlement conference. In that event the case is set for a settlement conference over which a Judge presides and settlement is discussed. If settlement is not agreed upon and all the examinations have been held and depositions taken the case is set for a pre-trial conference. At these conferences counsel for both parties appear and bring with them their clients and medical reports. If insurance is involved, the insurance adjuster appears along with counsel for the defendant.

Prior to these pre-trial conferences all parties have very wide rights of discovery which include not only the examination of the plaintiff and the defendant but the examination of any persons who might possibly be witnesses. On these examinations the depositions of the witnesses are taken and any pertinent records in their possession are produced. Under this procedure the plaintiff's attorney may take the depositions of the doctor who examined the plaintiff on behalf of the defendant and the defendant may take the depositions of any doctors who have attended

the plaintiff. Likewise all hospital records can be obtained by taking the depositions of the custodian. The pre-trial conference must therefore only be considered in the light of these very wide powers to take evidence under oath from all possible witnesses prior to the trial.

In Southern California a panel of medical experts has been set up by a committee composed of representatives of the medical profession, the legal profession and the Judges. The machinery for the use of the independent medical expert testimony plan is very elaborate and has been used in only a very few cases. One member of the Bench, who was a supporter of the plan, explained the lack of its use on the ground that the Judges generally were not in sympathy with it. It was contended by a member of the Bar, who has a very wide practice on the plaintiff's side, that under the plan independent experts remain independent for a very short time. He contended that as soon as their names were known insurers in the personal injury field employed the doctors on the panel to make examinations of plaintiffs on behalf of the insurers, and the panellists soon ceased to be independent. Like the New York Plan the system could not function apart from the pre-trial procedure.

In discussions with members of the legal profession in both Southern and Northern California the view was expressed that 95 per cent of the members of the Bar were against the pre-trial procedure. They contended that it was unnecessary; that it created delays, and that it added expense to the trial. One prominent member of the Bar said that it was a waste of time. Judges seemed to be emphatically in favour of the pre-trial procedure on the ground that they contended that it substantially cleared their calendars. The members of the Bar felt that the cases cleared from the calendars through pre-trial procedure would be settled in any case.

In attending these pre-trial proceedings one felt that the whole procedure was foreign to a proper judicial disposition of the case. The system followed was this: the attorney for the plaintiff and the defendant would come into the Judge's private room with the insurance adjuster and the plaintiff and in a perfunctory way tell the Judge their respective versions of the case. The Judge would draw from them what propositions of settlement had been made. Following this one party would be sent out (e.g. the plaintiff) while the Judge discussed the case with the defendant's attorney and the insurance adjuster.

He would try to get from the defendant the most favourable offer and an indication of what the maximum limit would be that the defendant was willing to pay. Then the defendant's attorney would be sent out with the insurance adjuster and the plaintiff and his attorney would be brought into the Judge's chambers. The Judge then communicated to the plaintiff what the defendant's maximum offer was and the Judge indicated his opinion that the case ought to be settled. Throughout the procedure the Judge was not performing a judicial function but acting as a conciliator.

The record of trials for a week in San Francisco was checked and it indicated that, notwithstanding all the pre-trial procedure, a very heavy proportion of the cases that come on the trial list are settled on the eve of the trial.

The whole system in California operates under the law which permits cases to be taken on a contingency basis. The regular contingency contract is that the attorney for the plaintiff gets 33 per cent of the amount recovered.

PRACTICE IN TASMANIA

In Tasmania the Rules of Court make the exchange of medical reports obligatory. Order XXXIX was amended in 1958 by inserting the following rules:

> "1A-(1) The Court or a judge may, at or before the trial of an action, order or direct that all or any of the evidence therein shall be given by affidavit.
>
> (2) An order or direction under this rule may be made or given on such terms as to the filing and giving of copies of the affidavits or proposed affidavits and as to the production of the deponents for cross-examination as the Court or judge may think fit but, subject to any such terms and to any such subsequent order or direction of the Court or a judge, the deponents are not subject to cross-examination and need not attend the trial for that purpose.
>
> 1B - The Court or a judge may, at or before the trial of an action, order or direct that the number of medical or expert witnesses who may be called at the trial shall be limited as specified by the order or direction.
>
> . . . .
>
> 1D- In an action of whatever nature, except in a case in which, at or before the trial, the Court or a judge otherwise orders or directs, the oral evidence of an expert witness sought to be called on account of his skill and knowledge as respects facts in issue involving expert opinion (including evidence of comparable sales by a valuer) is not receivable in evidence at the trial unless at such time before the trial as is fixed by order of a judge on the summons for directions, or, if no time is so fixed, within a reasonable time before the commencement of the trial, a copy of a proof containing the substance of his evidence has been made available to each of the parties for inspection.

> "1E - Any order or direction under Rule 1A, 1B, 1C or 1D of this Order (including an order made on appeal) may, on sufficient cause being shown be revoked by a subsequent order or direction of the Court or a judge made or given at or before the trial."

The Honourable Mr. Justice Crisp of the Supreme Court of Tasmania advised your Committee that the above-quoted Rules have established a satisfactory practice and that in his opinion the profession would not wish to revert to the practice prevailing before the Rules were adopted.

CONCLUSION

Your Committee has come to the conclusion that neither of the New York or California plans for expert medical testimony nor any modifications thereof in effect in other States of the Union should be adopted in Ontario but we recommend that the exchange of medical reports should be made obligatory with the right of either party to apply to the Court to be relieved of this obligation.

PART II

HOSPITAL RECORDS

The production of hospital records is closely related to the presentation of satisfactory medical testimony in Court. Access to hospital records is governed by Regulation 523, passed under the provisions of The Public Hospitals Act, R.S.O. 1960, chapter 322. Section 41, the relevant provision of this Regulation, reads as follows:

"41.-(1) Subject to subsections 2 and 3, a board shall not permit any person to remove, inspect or receive information from a medical record.

(2) Subsection 1 does not apply to:

(a) a person with a process,

(i) issued in Ontario out of a court of record or any other court, and

(ii) ordering the removing of, the inspecting of or the receiving of information from a medical record; or

(b) an inspector.

(3) A board may permit,

(a) the attending physician;

(b) the superintendent of another hospital who makes a written request;

(c) a person who presents a written request signed by,

(i) the patient, or

(ii) where the record is of a former patient, deceased, his personal representative;

(d) a member of the medical staff but only for,

(i) teaching purposes, or

(ii) scientific research that has been approved by the medical-staff advisory committee;

(e) a person with a written direction from the Deputy Minister of Veterans Affairs (Canada) or some person designated by him, where the patient is a member or ex-member of Her Majesty's military, naval or air force of Canada; or

(f) the Director of the Division of Medical Statistics of the Department or an officer or employee of the Commission who is designated by the Chairman,

to inspect or receive information from a medical record.

. . . . ."

Two difficulties arise out of the provisions of this Regulation:

(1) Interested parties do not have the right of access to hospital records before the trial of an action.

(2) The records per se have no evidentiary value.

In considering the solution of the difficulties that arise under the law as it is in Ontario, it is important to remember that the hospital record is not the property of the patient but the property of the hospital. Nevertheless in the preparation of any case it is essential that physicians conducting a medical examination of a party for the purpose of litigation, whether on behalf of the plaintiff or the defendant, should be fully informed of what is contained in the hospital record.

In addition to personal injury cases there are cases of another nature where information contained in a hospital record may be a determining factor. One such case comes to mind where the issue was the time of death of the patient. The case arose out of a murder and a subsequent suicide. Those who attended the murdered woman assumed that she was dead when placed in the ambulance and taken to the hospital. Upon all the information furnished to the plaintiff's solicitors, the suicide appeared to follow the murder. When the hospital records were produced under subpoena it was revealed that the woman was breathing when taken into the hospital and died immediately afterwards. The hospital intern who made the entry was available to prove this

fact when it was brought to the attention of counsel for the parties through the production of the hospital records in Court. The result was that upon the truth being known the plaintiff's case collapsed. It is obvious that the course the parties were required to follow in this case was expensive and created great hardship. If the intern from the hospital had not been available to give evidence, a grave miscarriage of justice might have occurred.

There would seem to be no reason why the hospital authorities should have a right to refuse a patient access to his records before a trial while access to the records is authorized when they are produced in Court under process of the Court. Early access to the records would undoubtedly enable the parties to be better prepared for trial or settlement of the action.

This is the view taken by Haines, J. in Annie Josephine McGilly v. Neil Cushing et al, 1964 O.R. Vol. 2, 544 when he made an order under Rule 349 for the production of hospital records, which reads as follows:

> " Where a document is in the possession of a person not a party to the action and the production of such document at a trial might be compelled, the court may at the instance of any party, on notice to such person and to the opposite party, direct

> "the production and inspection thereof, and may give directions respecting the preparation of a certified copy that may be used for all purposes in lieu of the original."

The solicitors for the hospital in this case advised the Court that the hospital had no objection to an order which (1) authorizes a party to an action or his representatives to examine its medical records at the hospital, (2) directs the hospital through one of its staff members to attend with medical records at a pre-trial examination, or (3) directs the hospital to provide copies of its medical records at cost to a party to an action or his representative. The order directed the proper officers of the hospital to permit the defendant or his solicitors to inspect and receive information from the medical record of the plaintiff, the inspection to be made in the presence of a member of the staff of the hospital upon 48 hours' notice to the hospital. The solicitors for the plaintiff were authorized to attend the inspection and make a similar examination of the medical records. While the Court held that it had no authority to direct the hospital to make copies of its records for any party to the litigation, the making of the copies was authorized.

The use to be made of the records when produced is a more difficult problem. These records are kept

in the interests of the patient in order that he may receive proper medical attention. The entries may be made by qualified medical practitioners, or medical practitioners in training, qualified nurses or nurses in training and others. Those serving on the staffs of the hospitals, whether as interns or nurses, very frequently serve on a temporary basis and leave the hospital to practise their professions in other parts of Canada or in other parts of the world. Under the law as it is now, the record has no evidentiary value but may only be brought to the Court by subpoena. It may not be looked at by the Court nor is any express legal authority given to the legal or medical professions to look at it.

Another practical difficulty arises when the hospital record is brought to Court under a subpoena. The librarian from the hospital attends as a witness and produces it. Since it is not evidence it cannot be filed except on consent of the parties. The question is, what is to be done with it?

These difficulties emphasize a much wider problem, that is the weakness of the common law with regard to the proof of records kept in the ordinary course of business.

The absurdity of the common law is forcibly exposed in Myers v. Director of Public Prosecutions, (1964) 3 W.L.R. 145. This was a criminal case to which the amendment to the English Evidence Act of 1938, 1-2 Geo. VI, ch. 28, did not apply. Further reference to this amendment will be made in due course. The appellant was charged with another man with conspiracy to receive stolen cars and conspiracy to defraud the purchasers of stolen cars and receiving certain specific stolen cars, knowing them to have been stolen. In order to establish that the cars sold by the appellant were stolen cars, the prosecution called as witnesses employees of the manufacturers of the cars who produced records compiled by various workmen as the cars were made, purporting to show the engine, chassis and cylinder block numbers which had been recorded on a card by employees of the manufacturers during the process of manufacture. The number on the cylinder block was moulded into a secret part of the block and could not be obliterated or removed. The witnesses called were persons charged with the keeping of these records and not with their compilation. The defence objected to the admission of the evidence

on the ground that it was ~~heresay~~ hearsay and that the manufacturers' records could not be tendered as proof of the truth of the facts stated therein. The trial Judge admitted the evidence and the Court of Appeal supported the trial Judge's decision. Although the House of Lords confirmed the conviction under the provisions of the Criminal Appeal Act, 1907, holding that notwithstanding they were of the opinion that the point raised in the appeal might be decided in favour of the appellant, the appeal should be dismissed because the Court considered no substantial miscarriage of justice had occurred. Lord Pearce and Lord Donovan dissented. Lord Reid, who wrote the leading majority judgment said:

> " The reason why this evidence is maintained to have been inadmissible is that its cogency depends on hearsay. The witness could only say that a record made by someone else showed that, if the record was correctly made, a car had left the works bearing three particular numbers. He could not prove that the record was correct or that the numbers which it contained were in fact the numbers on the car when it was made. This is a highly technical point, but the law regarding hearsay evidence is technical, and I would say absurdly technical. So I must consider whether in the existing state of the law that objection to the admissibility of this evidence must prevail."

Accordingly the Court held that the objection must prevail. Lord Pearce in dissenting sought to develop

the law of evidence so that it might be consistent with the realities of modern life and modern means of communication of facts. At page 173, in dealing with the extensions to the hearsay rule, his lordship stated:

> " While I give weight to the general explicit or implicit disapproval of further extension, expressed obiter in Woodward v. Goulstone (I.P.D. 154, 241) I cannot accept that from 1886 no further evolution was possible in particular circumstances or sets of circumstances on the general principles expressed by Jessel M.R. Since that date life has greatly changed in various respects. With the necessity created by death the courts were familiar and they had evolved exceptions which dealt reasonably adequately with that phenomenon. With the necessity created by insanity Lord Eldon and Lord Cottenham had dealt and I cannot find that they have been overruled. The necessity created by mass production and modern business they could not then foresee. They did not provide for the anonymity of modern industrial records and the difficulty of tracing those who made them. The individuality of persons in a large factory or business may be difficult or impossible to discover. They do many repetitive and almost automatic tasks concerning which no memory exists. Yet their composite efforts make machines and records whose complexity, efficiency, and accuracy are beyond anything imaginable in 1886. In my view the anonymity of the recorder or the impossibility of tracing him create as valid a necessity as does his death for allowing his business records to be admitted. The principles on which the court sets out to discover the truth about these things remain unchanged, but the way in which those principles are applied must change if the principles are to be honoured and observed."

And at page 175:

> " There are on balance strong grounds for admitting the evidence in this case. The evidence is clear and cogent on a vital issue in the case. It is the best evidence. There is no authority directed to this point which binds your Lordships to exclude it. The basic principles which have found expression in other sets of circumstances clearly justify it and demand expression in this class of case also. The admission of this evidence is in accordance with a certain degree of practice which is fair and sensible. Its admission cannot disturb or offend any existing legal principles. In so far as the admission throws up by contrast some exclusion in some other class of case as being anomalous, that is no disadvantage. The development of this branch of the law has always been sporadic.
>
> In my opinion, where the person who from his own knowledge made business records cannot be found, and where a business produces by some proper servant, who can speak with knowledge to the method and system of record-keeping, its records reliably kept in the ordinary way of business, they should be admitted as prima facie evidence. I say reliably kept because the judge must clearly have a discretion to exclude from a jury (as he would reject from his own mind in adjudicating) records so ill-kept as not to be worthy of credit. If any question arose about that, he could hear evidence or argument about it in the absence of the jury, as is done, for instance, in the case of confessions."

With the exception of section 34 of The Evidence Act, R.S.O. 1960, ch. 125, the common law as set out in Myers v. Director of Public Prosecutions is applicable in Ontario. This section reads as follows:

"34.-(1) In this section, 'bank' means a bank to which the Bank Act (Canada) applies or the Province of Ontario Savings Office, and includes a branch, agency or office of any of them. (sic)

(2) Subject to this section, a copy of an entry in a book or record kept in a bank is in any action to which the bank is not a party prima facie evidence of such entry and of the matters, transactions and accounts therein recorded.

(3) A copy of an entry in such book or record shall not be received in evidence under this section unless it is first proved that the book or record was at the time of making the entry one of the ordinary books or records of the bank, that the entry was made in the usual and ordinary course of business, that the book of record is in the custody or control of the bank, or its successor, and that such copy is a true copy thereof, and such proof may be given by the manager or accountant, or a former manager of the bank or its successor, and may be given orally or by affidavit.

(4) A bank or officer of a bank is not, in an action to which the bank is not a party compellable to produce any book or record the contents of which can be proved under this section, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the court or a judge made for special cause.

(5) On the application of a party to an action, the court or judge may order that such party be at liberty to inspect and take copies of any entries in the books or records of a bank for the purposes of such proceeding, but a person whose account is to be inspected shall be served with notice of the application at least two clear days before the hearing thereof, and if it is shown to the satisfaction of the court or judge that such person cannot be notified personally, such notice may be given by addressing it to the bank.

(6) The costs of an application to a court or judge under or for the purposes of this section, and the costs of any thing done or to be done under an order of a court or judge made under or for the purposes of this section, are in the discretion of the court or judge who may order such costs or any part thereof to be paid to a party by the bank, where such costs have been occasioned by a default or delay on the part of the bank, and any such order against a bank may be enforced as if the bank were a party to the proceeding."

As far as civil cases are concerned, the law applicable in England has been governed by the amendment to the Evidence Act made in 1938 to which we have already referred. It reads as follows:

"1.- (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say -

(i) if the maker of the statement either -

(a) had personal knowledge of the matters dealt with by the statement; or

(b) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(ii) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible as evidence or may, without any such order having been made, admit such a statement as evidence.

(a) notwithstanding that the maker of the statement is available but it is not called as a witness;

(b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) For the purposes of this section a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the foregoing provisions, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner, and where the proceedings are with a jury, The Court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

2.- (1) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether of not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.

(2) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by this Act shall not be treated as corroboration of evidence given by the maker of the statement.

3.- Subject as hereinafter provided, in any proceedings whether civil or criminal, an instrument to the validity of which attestation is requisite may, instead of being proved by an attesting witness, be proved in the manner in which it might be proved if no attesting witness were alive:

Provided that nothing in this section shall apply to the proof of wills or other testamentary documents.

4.- In any proceedings, whether civil or criminal, there shall, in the case of a document proved, or purporting to be not less than twenty years old, be made any presumption which immediately before the commencement of this Act would have been made in the case of a document of like character proved, or purporting, to be not less than thirty years old.

5.- It is hereby declared that section ninety-nine of the Supreme Court of Judicature (Consolidation) Act, 1925, and section ninety-nine of the County Courts Act, 1934 (which relate to the making of rules of court) authorize the making of rules of court providing for orders being made at any stage of any proceedings directing that specified facts may be proved at the trial by affidavit with or without the attendance of the deponent for cross-examination, notwithstanding that a party desires his attendance for cross-examination and that he can be produced for that purpose.

6.- (1) In this act -

"Document" includes books, maps, plans, drawings and photographs;

"Statement" includes any representation fact, whether made in words or otherwise;

"Proceedings" includes arbitrations and references and "Court" shall be construed accordingly.

(2) Nothing in this Act shall -

(a) prejudice the admissibility of any evidence which would apart from the provisions of this Act be admissible; or

(b) enable documentary evidence to be given as to any declaration relating to a matter of pedigree, if that declaration would not have been admissible as evidence if this Act had not passed.

7.- (1) This Act may be cited as the Evidence Act, 1938.

(2) This Act shall not extend to Scotland or Northern Ireland.

(3) This Act shall come into operation on the first day of September nineteen hundred and thirty eight." -1938 1-2 Geo. VI. c.28.

In the United States of America the problem was solved by legislation nearly thirty years ago. All cases coming under the Federal jurisdiction in the United States are governed by the Federal Business Records Act, Title 28, U.S. Code, Section 1732. This Act is comprehensive and applies to hospital records coming within the Federal jurisdiction. It reads as follows:

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum of record of any act, transaction, occurrence or event, shall be admissible as evidence of such act, transaction, occurrence or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business" as used in this section includes business, profession, occupation and calling of every kind."

Subsection (b) as amended (August 30, 1961, Public Law 87-183), permits the destruction of the original record when a copy or photostat is made, and provides that the introduction of the reproduction in evidence is admissible to the same extent as the original would have been.

The Federal Act follows one of two draft proposals made by the Uniform Laws Conference of the United States of America in 1936. Similar Acts have been generally adopted by the legislature of the various States in the Union: See Wigmore, 3rd edition, para. 1520, Vol. 5, page 361, et seq.

The California Civil Procedure Code, sections 1953 (e) to 1935 (h), follows in principle the Federal Act. These sections provide for the admission as evidence of any business records. The relevant sections read as follows:

> "1953. (e) The term "business" as used in this article shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.
>
> (f) A record of an action, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if in the opinion of the Court the sources of information, method and time of preparation were such as to justify its admission."

Your Committee had a most useful conference with the members of the executive of the Ontario Hospital Association and their counsel, Mr. Meredith Fleming, Q. C. Those present were most conscious of the difficulties involved in procuring the production of hospital records and showed an anxiety to procure a solution of these difficulties, that would not infringe on any of the basic rights of the individual.

Your Committee is of the opinion that the problem, in so far as it does not involve an action against the hospital should be approached in this way:

(1) The hospital records should be produced to the solicitor for the patient for his inspection upon the written consent of the patient, unless it can be demonstrated that the record contains statements that in the opinion of his medical advisers ought not to be communicated to the patient.

(2) Where an action is brought by the plaintiff in which he claims damages by reason of his confinement in the hospital or treatment therein, the hospital record should, unless good cause can be shown, be available for inspection by the solicitors for the plaintiff and the defendant and their medical advisers.

Mr. Fleming suggested that the provisions of subsection 5 of section 34 of The Evidence Act might be adapted to provide for inspection of hospital records. Mr. Fleming's suggestion is that in order to avoid multiplicity of applications to the Court it be proposed for consideration that the Judicature Act be amended by adding a new section 75A to read as follows:

> "75A (1) In any action for the recovery of damages or other compensation for or in respect of bodily injuries sustained by any person, a party to the action may on praecipe to the court obtain an order that such party be at liberty to inspect and take copies of any medical or other record of such person in the possession or custody of a hospital not earlier than 10 clear days after service of a copy of the order on the hospital.
>
> (2) A hospital affected by a praecipe order obtained under subsection 1 may within 5 clear days after service of a copy of the order on it move to set aside the order or to vary the terms thereof."

Your Committee considers that this is a very constructive suggestion. However, if it is adopted the notice of the praecipe order should be served on the solicitor for the plaintiff, or in the case where the plaintiff is acting without a solicitor, on the plaintiff himself, and either the plaintiff or the hospital should have the right to move to set aside the order or vary the terms.

Your Committee, however, is of the opinion that

the whole matter should be dealt with on a broader basis than a mere consideration of hospital records. As emphasized in the judgements in Myers v. Director of Public Prosecutions, ut supra, ~~infra~~, the law of evidence with respect to the proof of the contents of records kept in the ordinary course of business is quite unrelated to modern scientific developments in the making and the keeping of records.

Your Committee is of the opinion that legislation along the lines of the Federal Business Records Act should be enacted in Ontario. Since the form of such legislation is quite beyond our terms of reference we recommend that the matter be referred to the Ontario Law Reform Commission for recommendation as to the precise form the legislation should take. In drafting the legislation all modern developments in mechanical and electronic methods should be given consideration.

PART III

MALPRACTICE

The matter of procuring evidence in malpractice cases may not come strictly within the terms of reference of your Committee, but the subject was raised by the committees of the medical and legal professions.

It is quite evident that members of the legal profession are gravely concerned about the traditional difficulty in getting proper medical evidence before the Court where a member of the medical profession is the defendant in a malpractice action. The view has been expressed by some members of the medical profession that in no case should one member of the profession give evidence in support of a claim against another member of this profession. Eminent leaders of the profession have shown a real anxiety lest such a view prevail to the detriment of the administration of justice. Experience, however, indicates that the difficulty in procuring objective medical testimony in malpractice cases has not yet been satisfactorily resolved. This difficulty has operated to the great detriment of the medical profession in certain States

of the Union. The result has been that the law has been so developed in some States as to put a heavy onus on the doctors wherever some treatment or surgery has allegedly gone wrong. In the State of California what is referred to there as the "conspiracy of silence" on the part of the medical profession became so well known in the Courts that it brought about a development of the doctrine of res ipsa loquitur to such an extent as to be oppressive on defendants. A reference to the decisions in the California Courts shows what can develop in a society where the Courts are deprived of complete access to the truth.

The Court of Appeal of California has decided that where the plaintiff suffers unusual injuries while unconscious and in the course of medical treatment, all those who had control over his body, or the instrumentalities which may have caused the injuries, may properly be called upon to meet the inference of negligence and to show that the injury was not caused by their negligence. The patient injured while unconscious on the operating table in the hospital may hold all or any of the persons who have any connection with the operation liable even if he cannot select the particular acts by the particular person

which led to the disability. The inference of negligence is not required to be an exclusive or compelling one. It is enough that an appellate Court cannot say that reasonable men could not draw it. See Seneris v. Haas, 45 C. (2) 811 P. (2) Ybarra v. Spangard, 93 C.A. (2) 43; 208 Pac. (2) 445; Summers v. Tice, 33 C. (2d) 80; Bauer v. Otis, 133 C.A. (2) 439; 284 P. (2) 133.

In discussions with members of the legal profession and counsel for the medical profession it was stated that in California malpractice actions have become so prevalent that on the average one out of every four doctors is sued at some time for malpractice.

In Northern California the members of the medical profession are insured in the American Mutual Liability Insurance Company, which operates a plan in conjunction with the organized medical profession. A panel of doctors is set up by the respective medical societies, consisting of outstanding men nominated by a committee of doctors and lawyers. This panel considers the complaints of malpractice and if the panel finds that the complaint is well founded the insurance company is directed to settle the case unless the demands are excessive. If reasonable settlement cannot be made,

liability is admitted and the matter becomes an assessment of damages. Such a plan for all practical purposes amounts to an unofficial administrative tribunal.

Difficulties have arisen with respect to lawyers seeking to call members of the panel to give evidence or to take their depositions before trial, as is permitted in the State of California, but not permitted in Ontario, for the purpose of showing what sort of evidence the doctors would give. The attitude of the medical profession is that these members of the panel are not available to testify and where lawyers have attempted to get their depositions these attempts have been resisted and so far this resistance has been supported by the Courts. The insurance company will not settle the case without the consent of the doctors' committee and will settle the case when the committee recommends it.

In Alameda County the committee operates in this way: A case manager is appointed by the chairman of the committee for each case. He investigates it and does the research and when the committee meets the case manager reports the facts and may or may not express an opinion. The insurance company always

accepts the medical opinion.

It would not be in the public interest for the law to be developed in Ontario in such a way that it would operate in its application to the prejudice of the medical profession and their patients.

In malpractice cases in Ontario the medical profession has now many safeguards against this danger. Actions for malpractice must be tried by a Judge without a jury. This is a real safeguard. It can hardly be said that the law as now administered in Ontario is in any sense burdensome. On the other hand as mentioned before there has been some foundation in the past for the complaint by the legal profession that there has been at least a tacit arrangement among some members of the medical profession that a doctor should not give the same objective evidence in an action for malpractice that he would in any other personal injury case.

Your committee believes that those in authority in the medical profession and in the legal profession can resolve any difficulties that now exist. Both professions believe that the humblest citizen has a right to have his case tried in a court of justice that has access to the best evidence available, and in malpractice this requires objective medical

testimony given in the same manner as in any other personal injury case. To the extent that there may be any agreements or understanding among members of the medical profession to take a less objective attitude in malpractice cases, the governing and disciplinary bodies of the profession should be able to correct any tendency to interfere with the course of justice. This may require some courageous leadership but the medical profession is not without courageous leaders.

On the other hand, a heavy responsibility rests on the legal profession. The practising physician or surgeon is an easy target for the blackmailer. The disgruntled or unscrupulous patient can veritably destroy the reputation of the most eminent physician or surgeon by an ill-founded action for malpractice. If any member of the medical profession should have cause to complain about claims of that nature put forward by a lawyer in Ontario on behalf of a client, the governing body of the legal profession should promptly see to it that its disciplinary powers are vigilantly exercised.

Your Committee believes that a joint committee representative of the professions could well form

a means through which complaints of difficulty in getting proper evidence to support a well-founded claim for malpractice could be resolved.

PART IV

SUMMARY OF CONCLUSIONS

In stating the conclusions of your Committee it is to be clearly understood, unless otherwise indicated, that they are only relevant to actions involving personal injuries.

(1) Your Committee does not believe that the independent medical expert plan functioning in New York could be operated successfully in Ontario. Any success the plan has attained is dependent on its operation in very large metropolitan areas.

(2) The law of Ontario restricting medical examination on behalf of a defendant to touch and sight is unrealistic. It is quite impossible for a doctor to make a meaningful or realistic examination for the purpose of diagnosis or prognosis without knowledge of the history of the patient and without being permitted to ask questions, examine hospital records, previous x-rays and, where necessary, to consult with the attending physician. These sources of information cannot be properly developed through the examination of the plaintiff on discovery.

(3) Nothing said by the party examined during a medical examination should have any evidentiary value on the subject of liability.

(4) It is desirable that the plaintiff's physician and the examining physician should confer if they wish to do so and in proper cases conduct a joint examination.

(5) All reports, including x-ray reports, E.E.G. reports and other reports obtained by or for the plaintiff that are relevant to the injury complained of should be made available to the defendant's examining physician.

(6) The solicitor for the plaintiff or his representative ought not to be permitted to be present at a medical examination conducted on behalf of the defendant. There may, however, be proper cases where a third party should be allowed to be present, e.g. a parent of a child.

(7) The exchange of medical reports before trial should be obligatory, unless otherwise ordered by the Court.

(8) Your Committee recommends that a joint or agreed medical report should be submitted and accepted wherever possible.

(9) Except by leave of the Court, a doctor who has made an examination of a party should only be

permitted to be called as a witness if he has reported on his examination and his report has been furnished to the other side.

(10) Statutory provisions should be made for the admission in evidence in the discretion of the trial Judge of medical reports when signed by a duly qualified medical practitioner authorized to practice in Canada without the author of the report attending in Court to give evidence.

(11) Where the medical practitioner making the report is not authorized to practice in Canada we are of the opinion that the existing law should apply subject to the consent of the parties.

(12) Where in the opinion of the Court a doctor is required to attend in Court to give evidence which could have been satisfactorily received through a medical report, the Court should have authority in its discretion, to assess appropriate costs against the party calling the doctor.

(13) Your Committee emphasizes that the recommendations contained in this report are designed to improve the administration of justice and to reduce the inconvenience to the members of the medical profession and their patients to a minimum. If these recommendations are adopted the members of the medical

profession should assume a responsibility to see that medical reports are made as meaningful and objective as possible. They should contain a minimum of technical terms and irrelevant verbiage should be excluded.

(14) Your Committee has given careful consideration to the recommendation that provision should be made for a psychiatric examination of a plaintiff in proper cases. In the light of the fact that a physical examination has always been regarded by the common law as an intrusion on the privacy of the individual, your Committee has come to the conclusion that a plaintiff ought not to be compelled to submit to a psychiatric examination at the instance of a defendant before the trial. A psychiatric examination is very different from a physical or neurological examination. To be conducted successfully it requires the patient to disclose his most intimate personal history and relations with others. To require him by law to make such disclosures to one who is not his medical adviser would in the opinion of your Committee be an alteration of the common law that the circumstances do not warrant. Your Committee, however, realizes that there may be cases where the evidence develops at the trial in such a way that the trial Judge may

feel that injustice might be done in the absence of an independent psychiatric examination. Rule 267 might be amended to provide for such a case. Your Committee makes this recommendation with some reservation as we realize that a meaningful psychiatric examination is one that cannot be properly conducted in a short period of time.

(15) The Ontario Evidence Act should be amended to provide for the admission in evidence of all records made in the ordinary course of business. Your Committee prefers the Federal Business Records Act of the United States of America as a model from which to work. If this recommendation is adopted the amendment to The Evidence Act would not only apply to hospital records but it would have a very wide application to other business records. Your Committee therefore suggests that the recommendation be referred to the Ontario Law Reform Commission for its consideration and recommendation as to the form of the legislation.

(16) If the law is amended as recommended in the preceding paragraph so as to provide for the admission of hospital records, care should be taken to restrict it to proof of matters of fact and not matters of opinion.

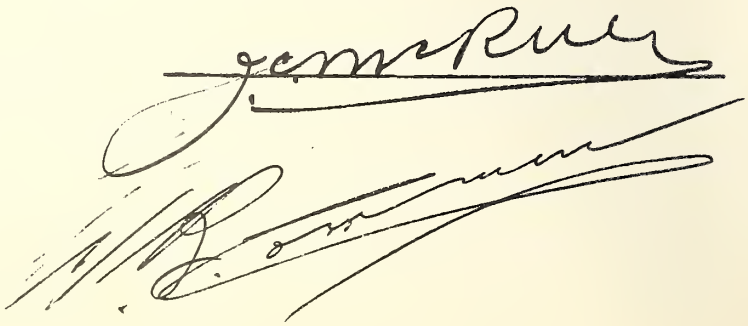
(17) Regulation 523, section 41, passed under the provisions of the Public Hospitals Act, R.S.O. 1960, Chapter 322, should be amended to provide that hospital records may be shown to the solicitors for the plaintiff and defendant unless the Court otherwise orders.

(18) In an action by a patient claiming damages caused by or arising out of his treatment in a hospital, the relevant hospital records should be made available for inspection by the solicitors for the parties to the action.

(19) Your Committee recommends that the necessary amendments to the statutue law, the Regulations passed thereunder and the Rules of Practice be made to give effect to the recommendations contained herein.

(20) A permanent joint committee of the Law Society of Upper Canada and the Ontario Medical Association should be set up to endeavour to resolve any problems that may arise in the future with respect to getting the best evidence before the Court in specific meritorious malpractice cases.

All of which is respectfully submitted.



APPENDIX NO. 1

M.E. 8A
1962 - 1963

MEDICAL EVIDENCE IN COURTS OF LAW

TERMS OF REFERENCE

1. The Joint Committee on Medical Evidence in Courts of Law was appointed with the following terms of reference:-

> "To consider and report upon the whole question of the presentation of medical evidence to courts of law and tribunals including:-
>
> 1. The gathering and availability of such evidence.
>
> 2. The availability of medical witnesses.
>
> 3. Questions of professional confidence."

MEMBERSHIP

2. *General Council of the Bar:

Patrick O'Connor Q.C.
Malcolm Morris, Q.C.
James Stirling, Q.C.

Law Society

K.J.H. Nichols
A.C. Prothero
F.G. Stigant
E.A. Williams

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*Mr. Justice Lawton and Mr. Justice Ormrod were originally members of the Joint Committee, but resigned membership upon their elevation to the Bench, which took place in January 1961 and November 1961 respectively. Mr. Victor Durand, Q.C. was appointed to succeed Mr. Justice Lawton, but resigned his membership in January 1962, and was succeeded by Mr. James Stirling, Q.C.

British Medical Association

H.H. Langston (Chairman)
Michael Ashby
F.E. Camps
Desmond Curran
H. Osmond-Clarke
S. Noy Scott

INTRODUCTION

3. When proposing that a joint enquiry should take place the British Medical Association was aware that from time to time doubts had been expressed by members of the medical profession and others, whether the traditional method of presenting medical evidence to the Courts is the best means of serving the ends of justice.

4. In addition, the criticism had been made that solicitors frequently find it difficult to persuade consultants and general medical practitioners to give evidence in court. Because of the time involved and the use of the subpoena procedure, many doctors and consultants seek to avoid becoming involved in medico-legal work.

5. This report has been prepared from both the medical and legal points of view with the aim of overcoming these and other difficulties. Its suggestions and recommendations are put forward with the following three objects in view:-

(a) Material medical evidence should be made as readily available as possible.

(b) Inconvenience to doctors and others responsible for tendering medical evidence should be reduced to the minimum compatible with the needs of justice.

(c) Doctors acting in a professional capacity as witnesses should be adequately compensated.

6. In the paragraphs which follow an attempt has been made to distinguish between proposals which require legislative or similar action, and those which could be implemented immediately by a greater awareness on the part of doctors and lawyers of the possibilities of the present system.

OBTAINING EVIDENCE

7. Professional Witnesses are divided into two classes, those giving evidence to fact, and expert witnesses. However, in medical matters it is frequently impossible to separate evidence of facts observed from evidence of opinions based upon them and, whilst the distinction is used in this report, this circumstance must be borne in mind.

Medical Facts

8. When setting out to obtain medical evidence to fact, the solicitor may be faced with the initial difficulty of deciding the correct practitioner to approach. His client may, while in hospital, have

been seen by several consultants and by members of the junior staff. Even if his stay was recent - and often it is not - the client's recollection as to whom to consult may well be unreliable. In such circumstances, when the name of the practitioner concerned is not certainly known, the solicitor has two courses open to him. Either he may seek the guidance of the patient's general practitioner, or he may make the request through the secretary of the hospital authority as laid down in Ministry of Health circular H.M. (59) 88 (Appendix I).

9. Paragraph 5 of H.M. (59) 88 refers to the necessity for obtaining the consent of the person concerned before making disclosure of his or her hospital notes to a third person. The Joint Committee believes that in cases in which the disclosure of information without consent would be a breach of the pledge of professional secrecy only, there is no intrinsic reason why the patient should not himself decide whether or not to give his consent to disclosure. Where legal proceedings are either in being or in contemplation, the patient will normally be incapable of deciding the legal significance of consenting to disclosure and, in such cases, it is in the patient's interest that his legal adviser be consulted before a

decision is made.*

10. It should, moreover, always be made quite clear to the individual concerned that hospital notes may well contain reference to - or full records of - conditions other than that which is of direct importance. Disclosure of such information, whilst not strictly relevant to the immediate issue could be damaging to his case. In the event of any doubt or obscurity as to the medico-legal implication of any part of the records, it would be very desirable that the patient, or his adviser, obtain medical guidance before consent is given.

Medical Expert Opinion

11. When seeking a report from a practitioner who has not taken any part in the care of his client the solicitor may need advice about a suitable expert to approach. Two courses are again open to him: to consult his client's general practitioner, or to study the hospital section of the 'Medical Directory'. The former course is to be preferred, as the matter can then be fully discussed if necessary. The 'Medical Directory' gives an indication of the field of practice or specialty of many medical practitioners, together with any hospital appointments which they may hold.

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* Vide Section - "Privilege" (Paras. 41-48).

The Hospital section of the Directory lists all consultant staff under their respective specialties. Its use will facilitate an approach to a specialist who may be in a position to help, and reference to it when there is doubt may well save a fruitless approach. Neither enquiry of the general practitioner, nor study of the 'Medical Directory' however, can give any indication of the willingness of the expert to assist in the case; this must be ascertained by direct enquiry.

Professional Duty

12. It has been said that solicitors representing either a civil litigant or an accused person frequently have difficulty in obtaining medical assistance. Doctors generally dislike giving evidence and fear that undertaking to do so may involve them in considerable loss of time; measures to reduce this loss are considered later in this report. Where evidence of fact is concerned, the Committee believes that a practitioner has a duty to assist his patient, even if he does not agree with the patient's allegation, e.g. negligence by a colleague.

13. The practitioner requested to assist as an expert is free to decide whether he will do so. Should he accede to a request to make an examination and to

report, he must also accept the possibility of being called to give evidence upon his findings and opinions. Nevertheless, though the practitioner is free to decide whether to assist, the Committee believes in this respect also that the medical profession has a civil duty to promote the administration of justice and that professional associations should remind their members periodically of this duty. Moreover, an inevitable corollary of the refusal of those best qualified by training and experience must be that less expert evidence is obtained, possibly to the detriment of the course of justice.

14. Similarly, solicitors have a duty when seeking medical assistance to ensure that the doctor concerned is adequately acquainted with the circumstances of the case. Only then will his report be as pertinent and valuable as possible. The Joint Committee believes that the appearance, from time to time, in their professional journals of articles reminding both lawyers and doctors of their functions in assisting each other would be very desirable.

15. It has been suggested that the position would be improved if there were available to solicitors lists of practitioners in the several specialities known to be expert and to be willing to assist in litigation.

If this proposal were possible, it would go far towards alleviating a recurrent and not infrequent problem. However the Committee has heard from its medical members that there is no organization capable - even if willing - to decide the names to be included in such lists. Moreover the publication of a practitioner's name in this way would in the opinion of the British Medical Association be ethically most undesirable, and indeed might render him liable to the disciplinary action of the General Medical Council. The Committee does not therefore make any recommendation in this matter, having been informed that the B.M.A. would be prepared to use its good offices in specific cases where difficulty arises.

Insufficient Information

16. A further aspect of the problem of obtaining medical evidence, is that referred to in paragraph 3 of H.M. (59) 88(Appendix 1). Should a Regional Hospital Board of Management Committee, having considered the advice given in the final sentence of that paragraph, decide that it cannot accede to the request to provide information, the litigant's solicitor will be in a position of some difficulty. He may have only his client's account of the medical history and happenings - often complex matters - and is in no position to decide whether there is substance to allegations made, for example of negligence.

17. As a result, actions are instituted on an exploratory basis which, when the documents do become available

at the stage of discovery, cannot be maintained. In the experience of members of the Committee this is not uncommon, a view which received support from the Medical Defence Union.

18. The Committee considered carefully whether any means could be devised - which would be equitable - and which would reduce the number of unnecessary exploratory actions, and the waste of time and money involved. Any such proposal, if it was always to be effective, would involve immediate and compulsory disclosure, and the Committee held the opinion that to place such an obligation on hospitals and the medical profession alone could not be justified.

19. The Committee would endorse the advice given in paragraph 3 of H.M. (59) 88, and shares the view of the Medical Defence Union "that the disclosure of information and perhaps of the notes may help the hospital and its staff to prevent litigation, and may be a wise step for them to take voluntarily, but it would be undesirable that there should be any compulsion."

PREPARATION OF REPORTS

20. In recent years there has been an increase in litigation concerning hospitals and doctors. A number of medical staff of varying degrees of experience are now liable to be called upon for medical reports - not only established consultants, specialists and general practitioners, but also less

experienced members of the profession, in hospital and elsewhere. It is necessary, therefore, that the function of the doctor in presenting such reports and in giving evidence should be quite clear. In clinical matters doctors, having assessed the medical facts, advise a course most advantageous to their patients. In medico-legal cases, there has been some criticism that doctors tend to give the injured man the "benefit of the doubt". Doctors should set out the medical facts as they know them and the inferences which, in their opinion, may properly be drawn from those facts; where these inferences are not clear the doctor should indicate this. It is necessary for the solicitor to establish not only the strength but also the weakness of his client's case before advising or acting for him; he therefore expects and wishes to receive a balanced medical report.

AVAILABILITY AND EXCHANGE OF REPORTS

21. One of the principal recommendations in the Report of the Evershed Committee on Supreme Court Practice and Procedure, intended to apply to the evidence of all expert witnesses including doctors, stated: "each side should be compelled to disclose to the other the medical reports of any doctor whom they may desire to call at trial. This would mean that the

"medical evidence of any doctor would not be receivable at the trial unless a copy of his report had been produced to the advisers for the other party at least 10 days before the trial, or unless for special reasons the court ... should otherwise order." The Evershed Committee went on to say that the Court should be given express power (on summons for directions) "to order the exchange of medical reports with a view to agreement if possible."

22. Such a course would produce obvious advantages. By eliminating occasions when medical witnesses are called to testify about differences in their reports that are more apparent than real, much time and money could be saved. It would also remove the possibility of tactical surprise in these matters, which is of doubtful value in assisting the Court to arrive at a decision.

23. After careful consideration, the Joint Committee are unanimously agreed that, subject to what is said in paragraph 24 below, the Evershed Committee recommendation contained in paragraph 352 of the Report (quoted in paragraph 21 above) has their full support.

24. The qualification the Joint Committee make is this; the Evershed Committee make this recommendation in the

context of a general recommendation in identical terms referring to expert evidence as a whole (paras. 290, 291 ibid.). The Joint Committee would be opposed to the implementation of the limited recommendation in regard to medical evidence in isolation, as this would create an exception to what is a general principle of English law that a party to proceedings is not obliged to disclose his evidence to the opposing party. The Joint Committee take the view, however, that this principle so far as it relates to expert evidence is one for consideration in relation to the whole field of expert evidence.

JOINT EXAMINATION AND AGREED REPORTS

25. The Committee is agreed as to the desirability of a joint medical examination in all cases where a medical examination is appropriate. There are, however, objections to joint consultation in the preparation of reports except by agreement of the parties or by order of the Court. It has been said that such a course would lead inevitably to suspicion of abuse or mala fides and would conflict with the principle that "justice must be seen to be done."

26. When the reports have been prepared they should be exchanged through the solicitors, which may result in their being agreed, and which in turn would obviate

unnecessary attendance(s) at Court, and expense.

27. When a prisoner in custody on a criminal charge is examined, delay is often experienced before the report of such examination is made available to the defence. In some instances the information may not be sent until the day of the trial. This situation should be remedied, and its correction is of particular importance where psychiatric reports are concerned. In order that reports of this nature may be speedily and fully prepared, the information contained in statements made to the police at the time of arrest should be available to the examining medical practitioner.

PLACING EVIDENCE BEFORE THE COURT

28. The Committee is of the opinion that further measures should be taken to eliminate wasted time for witnesses attending the Court. This would go far to removing one major reason for the reluctance of witnesses to come forward. The Committee believes that in this connection the medical profession has a greater claim to special consideration in that -

(a) doctors appear more frequently in the witness box than any other profession - except the police.

(b) the consequences to the public in terms of inconvenience, discomfort, and even danger, are more serious in the case of the unplanned absence from work of doctors than of anyone else. This has been long recognized by the exemption of doctors from jury service.

29. Despite their sense of obligation as citizens, many consultants are known to feel that they have a stronger duty to their patients. They will not agree, therefore, to becoming involved in proceedings which may involve cancellation of clinics and operating lists at short notice. Consideration must be paid to this feeling and means found to minimize this conflict of duties.

30. There are several steps which could be taken to reduce the time spent in attendance at Court. Much time is now wasted, and expense incurred, by witnesses attending in order to 'prove' certain documents. The committee agrees with the view of the Medical Protection Society:- "that no witness, whose sole function is to produce and prove a document, should be required to attend and give evidence, unless his attendance is specifically requested by the opposite party for the purpose of cross-examination."

31. The Evershed Committee made recommendations bearing on the same problem:-

(a) "that the production of any document ... from the custody where it might normally be expected to be, should in the absence of specific challenge, be prima facie evidence (i) that the document is genuinely what it purports to be, and (ii) that any writing, signature or initials appearing in the document is that of those of the person or persons whose writing, signature or initials it or they purport to be" (A Rule to the effect of (i) already exists in the County Court: see Order 20, Rule 13 of the County Court Rules.)

(b) "that for ordinary purposes a different form" (of subpoena duces tecum) "be used, omitting the requirements of personal attendance and so as to require only that the person served shall deliver or send the document or documents by registered post to the proper officer of the Court", provided that "the other side" was given the right to require the producing witness to attend for cross-examination, if desired.

32. A wider acceptance of documentary rather than oral evidence, with safeguards, would minimize expense and loss of time. The Evershed Committee proposed amendments to Section I of the Evidence Act 1938 which would bring this about in civil proceedings, and the Departmental Committee on Depositions (Byrne Committee) made similar proposals in connection with criminal proceedings.

33. In civil proceedings, the provisions of the Evidence Act 1938* should be extended and made more flexible by the introduction of the reforms suggested by the Evershed Committee, That:-

(i) in Section 1 (2) of the Act the words "if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused" should be omitted;

(ii) Section 1 (3) should be omitted altogether;

(iii) The proviso to Section 1 (1) should be extended so as to excuse the maker of the document from attending "where no party to the proceedings who would have the right to cross-examine him requires him to be called as a witness".

(iv) Section 1 (1) (i) (b) of the Act should be amended by omitting the words "supplied to him ... those matters".

34. Virtually all these delays should in our view be avoided by the immediate implementation of the recommendations of the Departmental Committee on Depositions

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* Section I of Evidence Act appears as Appendix II

(The Byrne Committee) to the effect that:-

(a) the prosecution may use as evidence in support of the charge a statutory declaration instead of calling the person making the declaration to depose to the facts therein contained.

(b) a draft deposition in writing should be allowed to be used as a witness's evidence in chief.

35. The Byrne Committee recommended several important safeguards under this head (14 days' notice to the accused who should be entitled to require a witness to be present, deposition to be read aloud, methods only available for certain offences, if the prosecution is legally represented and if the accused is more than 17 years old). These seem to the Joint Committee to be acceptable suggestions. Their introduction would, as the Byrne Committee said, greatly assist "doctors, pathologists, officers of forensic science laboratories and others whose evidence the defence have no intention of disputing or testing before the Justices".

36. The Committee has considered a proposal that a medical assessor should sit to advise the Court where appropriate. Provision is made for such appointments in certain statutes and in the Rules of the Supreme Court, but the provision is little used. The Committee does not favour the appointment of such medical assessors, believing that the main issues

should ordinarily be determined by a judge, possibly sitting with a jury. In particular it shares the view of the Medical Defence Union that the number of assessors would have to be very large, in order to cover all aspects of medicine, and that in many of these aspects there is more than one opinion as to the course to be followed. It would not therefore be right that any one medical man should be in the influential position of a single assessor.

ATTENDANCE AT COURT

37. There is no doubt that the present uncertainty about dates and times for hearings is a major factor in causing loss of time and interference with the normal duties of professional and other witnesses. As a result of the views expressed upon this point by the Evershed Committee, there has been some improvement in London by the fixing of the dates of major trials. Nevertheless, the present position leaves much to be desired. In order to obtain a fixed date for a hearing it is necessary to accept a considerable delay. When the date of beginning of a hearing is fixed it is usually impossible to inform expert witnesses of the actual day on which they will be called. Some judges have approved arrangements whereby medical evidence for both side can be called on the same day and such a course is much appreciated. Very much less in the way of improvement has yet been accomplished in respect of civil work at Assizes and in County Courts.

Very much less in the way of improvement has yet been accomplished at Quarter Sessions and in the County

Courts, and in respect of civil work at Assizes the position is considerably worse than hitherto. In many cases it is not possible to ascertain until a day or two before the hearing in which Assize town the case will be heard, and frequently it is only known late in one day that the hearing is due to take place on the next day. Even then many a medical witness, who attends Court at great inconvenience and cost to himself and hardship to his patients, finds that the case is not after all called on for hearing for some considerable time, or even on that day, and his time is thus wasted to no purpose.

38. It is impossible for general practitioners or consultants to make proper arrangements for the discharge of their professional commitments unless they are given reasonable notice of the time at which they will be required in Court. It is the firm view of the medical members of the Joint Committee that the present uncertainty is the main reason why doctors are reluctant, or even unwilling, to become involved as witnesses in legal proceedings and, in addition, that it is the main reason why some doctors seek to charge higher fees than they would otherwise seek to do.

39. The Joint Committee consider that steps should be taken as a matter of urgency to ensure that the day and time at which professional witnesses will be required to attend Court should be fixed and notified to them well in advance of the event. Solicitors and the police normally inform witnesses at the earliest opportunity of any

arrangements made about the dates or times for which they should be in readiness. It has sometimes happened that subsequent modifications, often at short notice, have to be made in the timetable, and witnesses have not been informed by the quickest means of such changes. As a result unnecessary cancellation of clinics or lists has occurred, and even wasted journeys to Court. When an alteration of arrangements is necessary witnesses should be informed by telephone, or telegram. Written confirmation can follow.

SUBPOENA

40. The Committee believes that in the majority of cases agreement is reached between medical witnesses and solicitors concerning attendances at Court and fees to be paid. It should be emphasized again that quite apart from the doctor's duty to assist justice, if he has 'qualified' by reading the papers and preparing a report, he may be called to give evidence. There have been cases however in which an inappropriate doctor has been served with a subpoena, causing unnecessary waste of time, inconvenience and expense. The wider use of pre-determined days and times for hearing would go far to obviate the present frequency of use of the subpoena. The Committee would agree with the Medical Protection Society in hoping "that solicitors will, as they almost invariably do, exercise great caution and restraint in serving subpoenas on professional witnesses."

PRIVILEGE

41. The Joint Committee has given much consideration to the question of privilege attaching to matters which a medical practitioner learns in the course of his professional relationship. At the present time there is no doubt that the relationship between a doctor and his patient does not excuse the former from making full disclosure to the Court, and it is clear that he refuses to do so at his peril - unless the answer would incriminate him.

42. On the other hand communications made to a legal adviser for the purpose of, or in contemplation of, litigation are privileged. This privilege extends to medical reports, made on behalf of either party, provided they are made in reasonable anticipation of litigation. It is not the privilege of the doctor or of the patient as such, but that accorded to the litigant in order that he may be protected in the preparation of his case.

43. The present position may be summarised as follows:-

(a) A doctor who is in possession of confidential information in whatever form it may be recorded, which he ascertained as a result of his treating a patient, should not disclose any part of it to a third person without the consent of the patient. To do so would be a breach of professional secrecy.

The doctor can, however, properly be required to disclose such information in evidence in either civil or criminal proceedings and may be subpoena'd to that end.

(b) A doctor who is in possession of confidential information which he ascertained as a result of a disclosure made for the purpose of litigation, cannot be compelled, even by the Court, to disclose it unless the litigant for whose case the information was obtained either expressly or impliedly consents to him so doing. Disclosure without such consent would be in breach of the privilege afforded to the litigant by law as well as being, in the case where the litigant is the doctor's patient, a breach of professional secrecy.

44. The absence of privilege for information obtained as a result of the doctor-patient relationship can tend to defeat the ends of justice. For example, full disclosure of a psychiatric history of findings may be extremely damaging to the cause of the person concerned, though the observations themselves are not strictly relevant to the issue before the Court. The fact that such a situation can arise must act as a discouragement to complete frankness.

45. The Committee believes, therefore, that there is a prima facie case for seeking a method whereby a medical witness could claim some limited privilege. Such a claim would not always be up-held, but it should be open to a medical witness to make it if

he believed that full revelation of all the facts in his possession would obstruct rather than assist the course of justice. If this became possible, then it would clearly be desirable that a claim should be made before the witness began his evidence, and in the absence of any jury.

46. Such a change would possibly require legislation or revision of the Rules of the Supreme Court. The Committee urges that early consideration should be given by the responsible authorities to this possibility.

47. The position of the industrial medical officer and his records and their possible disclosure is a special case. Varying opinions have been expressed ranging from one extreme to another. First, that the relationship of the industrial medical officer to the worker is in no way different from any other doctor-patient relationship and therefore the same ethical ban against disclosure exists. On the other hand it has been maintained that the industrial medical officer's notes are just as much company property as any other document in their possession and from a legal and ethical point of view indistinguishable from them and equally available to the employer.

48. The Joint Committee is of the opinion that these conflicting views can only be reconciled if note is taken in any instance of the circumstances in which the worker came into professional relationship with the industrial medical officer -

(a) When the workman receives an order to submit himself for examination in circumstances where it is clear that the examination is for the employer's benefit, he impliedly consents to the disclosure to the employers by the industrial medical officer of the results of the examination whether verbally or in the form of a report. In such cases, disclosure would not constitute any breach of professional ethics. It makes no difference whether submission to examination is made a condition of the contract of employment, or whether it is simply an ad hoc order.

(b) Where an employer expressly or by implication invites the workman to consult or receive treatment from the industrial medical officer in a general way for the benefit of the workman's health or well-being, the industrial medical officer should treat the workman's statements as privileged in the ethical sense.

(c) As privilege or no privilege depends on the nature of the invitation or order, it will be appreciated that this in the case of the same workman and doctor can vary from examination to examination. A workman can be ordered to submit to periodical examination for the employer's benefit, and at the same time be invited to use the Industrial Health Service for his private purpose.

FEES TO MEDICAL WITNESSES

49. The Members of the Joint Committee discussed questions relating to the fees of medical witnesses but do not consider that it is possible, nor is it their function, to deal with the amount of those fees either in civil or criminal cases, but in regard to the latter the Joint Committee suggest that the fees and allowances payable to expert and other professional medical witnesses should be raised to the general level of those payable in the former.

50. It would be difficult for the Joint Committee to lay down scales of fees which would be applicable to cases with medical issues of varying complexity and importance, demanding different skills, qualifications and experience. In any event any such scales would not be binding on the Court and could, therefore, be of value only as a guide to the medical profession in deciding what fees they should seek to charge. The Joint Committee take the view that it is for the medical profession itself to decide what fees should be sought.

51. It was apparent that the principles governing the payment of fees to professional witnesses are not always known which itself gives rise to misunderstanding, and a general outline is, therefore, stated as follows:-

The fee to be paid to a medical witness who is

called to give evidence as an expert is a matter of contractual arrangement between the witness and the solicitor acting as agent on behalf of the client who desires the services of the witness. It is most desirable that the fee which is to be paid should be negotiated and agreed before the witness undertakes to render his services. Such an arrangement is in the interest of the solicitor and of the witness and its importance so far as the solicitor is concerned, is emphasized by the following rule of conduct and etiquette laid down by the Council of The Law Society:-

> " Where a solicitor engages the services of a professional witness the Council consider that he should assume personal liability for the payment of the proper fee of that witness, unless at the time the services are requested he makes it quite clear to the witness concerned that he will not be personally responsible for payment of the fees involved and that the witness must look to the lay client for payment. In other words, the Council take the view that members of other professions are entitled to regard solicitors who instruct them to provide a service on behalf of a lay client as being personally responsible for payment of their fees, unless a specific disclaimer is conveyed to the witness before the service is rendered."

52. The Joint Committee believe that disputes between members of the medical and legal professions as to the fee which should be paid for services rendered on behalf of a client are undesirable and, though comparatively few in number, they contribute materially to the reluctance of doctors to give evidence. The Joint

Committee take the view that primarily the responsibility for ensuring that fees to be paid to a medical witness are agreed before the services are rendered, should be that of the solicitor and that this practice should form part of the ordinary procedure employed when securing the services of an expert. At present disputes upon the quantum of fees when not resolved by mutual agreement can only be determined by the witness taking proceedings in the appropriate Court. The Joint Committee are of opinion that such a method of resolving a dispute is to be avoided if at all possible and they suggest that The Law Society and the British Medical Association should together consider whether some provision for arbitration could be made in those cases which do arise. This alternative would be voluntary and available only when both parties agreed to use it and to abide by the decision of the arbitration.

53. One particular point is apt to cause difficulty in those cases in which there is a dispute about the fees of an expert witness. Apart from the question of ascertaining the fees which the expert is entitled to receive, it is also necessary, where the party concerned is successful, for the Court to decide whether the whole or only part of that fee may be recovered from the losing party. Thus, a client may be required to pay a fee to

an expert witness which is higher than the sum which he can recover from his opponent, but if the fee was negotiated properly, i.e. between the expert and the solicitor at the outset, the expert need not concern himself with the taxing officer's decision.

54. In legal aid cases, however, it is not always possible for the solicitor to be reimbursed for the fees paid by him to expert witnesses since the amount to be allowed is decided on the taxation of his costs by the Court after the case is concluded and he is not entitled to look to his client for repayment of any sum taxed off the fee paid to the expert. The solicitor's own pocket is, therefore, vulnerable.

55. The Joint Committee feel that it is important that both professions should appreciate the Statutory provisions which apply to the assessment of experts fees in legal aid cases, and the different factors which apply to civil cases on the one hand and criminal cases on the other. These Statutory provisions are set out in Appendix III.

CONCLUSION

56. Finally, the Joint Committee states the view that the relationship between the two professions has always been friendly. When disputes occur they are generally due to misunderstanding. There can be no doubt that

a greater knowledge of the difficulties and problems facing each of the professions in the field of forensic medicine would reduce these misunderstandings even further. To this end the Joint Committee commend the practice which has been so successful, in some parts of the country, of holding joint meetings between the local Law Societies and the local branches of the British Medical Association. These meetings have not only made it possible for common problems to be considered but also for the members of both the professions to get to know one another.

SUMMARY OF MAJOR CONCLUSIONS

Inter-professional Matters

1. Advice is given to solicitors on how best to obtain medical evidence of fact (para. 8) and expert medical evidence (para. 11).

2. The duty of doctors to promote the administration of justice, both in matters of fact and opinion, is emphasized, and professional associations can play a part in reminding their members of this (para. 13).

3. Solicitors have a duty to ensure that the doctor concerned is adequately informed of the circumstances of the case (para. 14).

4. Solicitors should continue to exercise restraint in the serving of the subpoena on professional witnesses (para. 40).

5. The Solicitor is responsible for taking steps to agree with the witness the fee to be paid him before he undertakes to render his services (para. 51).

6. The Law Society and the British Medical Association should consider devising voluntary provision for arbitration between their respective members in matters of fees (para. 52).

7. Fuller understanding of the problems of each others professions is desirable (para. 56); joint local meetings (para. 57) and articles in professional journals (para. 14) are commended as means to this end.

Preparation of Medical Evidence

8. Before the patient agrees to the disclosure of hospital records, the implication should be fully explained to him and in the event of any doubt or obscurity, appropriate professional advice should be taken (para. 10).

9. There should be the fullest possible disclosure of information (and, if necessary, of the hospital notes) on a voluntary basis (para. 19).

10. In compiling his medical report, the doctor should aim to present a balanced report and to set out the known medical facts and the inferences which may properly be drawn from those facts (para. 20).

11. The recommendation of the Evershed Committee regarding the exchange of medical evidence is endorsed subject to its applying to all expert evidence and not to medical evidence alone (paras. 23 and 24).

12. Joint Medical examination is considered to be always desirable, but joint consultation in the preparation of reports only by agreement or order of the Court (para. 25).

13. In criminal cases, the fullest possible information should be made available to the medical examiners and the information contained in statements made to the police at the time of arrest should be available to the examining medical practitioner (para. 27).

Attendance in Court

14. In order to reduce the time spent in attendance at Court, no witness whose sole function is to produce and prove a document should be required to attend and give evidence (para. 30).

15. The view of the Evershed Committee is endorsed that the production of any document should, in the absence of specific challenge, be prima facie evidence that it is genuinely what it purports to be (para. 31).

16. Wider acceptance of documentary rather than oral evidence would minimise loss of time (paras. 32 - 34), subject to certain safeguards (para. 35).

17. Steps should be taken, as a matter of urgency, to eliminate the present uncertainty regarding attendance at Court and unnecessary waiting (paras. 37 - 39).

Medical Privilege

18. The absence of privilege for information obtained as a result of the doctor-patient relationship can tend to defeat the ends of justice; early consideration should be given to seeking a method whereby a medical witness can claim some limited privilege (paras. 44 - 46).

APPENDIX I

H.M. (59) 88

NATIONAL HEALTH SERVICE

SUPPLY OF INFORMATION ABOUT HOSPITAL PATIENTS ENGAGED IN LEGAL PROCEEDINGS

Summary. This memorandum gives guidance on the release of information about patients who are taking or contemplating legal action either against the hospital or against a third party.

1. Hospital authorities are frequently asked by solicitors and others, for information about patients who have been or are being, treated there. It is desirable that such requests should be addressed to and handled by the Secretary of the Board or Committee (as is no doubt the normal practice) who will, of course, in the great majority of cases, have to consult and be guided in his reply by the medical or dental staff concerned. Legal advice may also be needed.

2. There are two main types of case in which hospital authorities are likely to be asked for information: that where the patient or his representative is taking or contemplating proceeds (or making a claim) against the Board or Committee or a member of their staff or both; and that where the patient is, or may be,engaged in litigation with a third party (the proceedings

being taken either by or against the patient) and neither the hospital authority nor their staff are directly involved.

3. Where a request for records or reports is made on what are manifestly insubstantial grounds, the hospital cannot be expected to grant it, but where information is being sought in pursuance of a claim of prima facie substance against the Board or Committee or a member of their staff or both, the decision is more difficult and each request must be examined on its own merits, in the light of legal advice, and of course in consultation with any member of their medical or dental staff directly concerned in the outcome of the claim (in this connection see H.M. (54) 32). The production of case notes and similar documents is not obligatory before the stage of discovery in the actual proceedings is reached, but the Minister does not feel that Boards and Committees, especially as they are public authorities, would either wish or be well advised to maintain their strict rights in this connection except for some good reason bearing on the defence to the particular claim or on the ground that the request is made without substantial justification.

4. Where the information is required in a matter which has nothing to do with the hospital or any member of its staff, e.g. in litigation between the patient and a third party, hospital authorities should be prepared to help by providing, as far as possible, the information asked for subject always to the consent of the patient. Sometimes the information sought may be entirely unrelated to medical matters - e.g. the date of the patient's admission or discharge; whether he was a private patient and signed the appropriate form of undertaking; and if so, the amount paid by way of hospital charges. Such information may properly be given by the Secretary of the Board or Committee, without reference to the medical staff. But in all cases - and they will undoubtedly be the majority - where medical matters are in any way involved (e.g. where information is wanted about the diagnosis made on admission, details of treatment, conditions on discharge, or prognosis) the doctor or dentist who was in charge of the patient's treatment at the hospital, or his successor, should be consulted. It is self-evident that this must be done when a medical or dental report is being asked for. But the principle is equally

important when the request is only for extracts from the case notes, since it is necessary for the doctor or dentist to ensure that any extracts which are made are not misleading, and also that their disclosure to the patient cannot in any way be harmful medically to him - it would, no doubt, often be undesirable to let the patient himself have so detailed a report of such full extracts from the medical records as it would be proper to give to his general practitioner. This decision is one which can be made only by a professionally qualified person. At the same time it is imperative that no material information which can in any way be relevant to the matter should be withheld in such a way as to convey a wrong picture. Reports about accidents prepared in accordance with H.M. (55) 66 are privileged documents, and therefore are not affected by this memorandum.

5. Where the request for information comes, not from the patient himself or his representative, but from some other party or the representative of some other party who is engaged in legal proceedings with him, no information of any kind should be supplied until written consent of the patient or his representative has been obtained, unless of course, a witness or document has been subjected to subpoena or discovery by the Courts. The only other exception made to this

rule should be where information is sought on behalf of another hospital Board or Committee (or a member of their staff), against whom the patient is bringing proceedings. In all appropriate cases the doctor in charge of the patient, or his successor, should be consulted as in paragraph 4.

6. The question of the circumstances in which a member of the medical or dental staff of the hospital may charge a fee for supplying information has given rise to some doubt. The position is governed by paragraph 14 of the Terms and Conditions of Service. Where the patient about whom information is required is at the time under observation or treatment at the hospital, the doctor or dentist is not entitled to make a charge (i.e. the work is in category I) unless it is necessary for him to make a special examination of the patient to enable him to furnish the information. Where the patient is not under observation or treatment at the hospital, or where a special examination is necessary, preparation of a report comes under category II and a doctor or dentist is entitled to make a charge.

Some difficulty may arise where the patient or his representative asks not for a medical report but for extracts from the case notes. In such cases the

doctor or dentist, though not called upon to prepare a report, will often have to examine the case notes in detail in order to make the relevant extracts to provide information which will neither be misleading nor prejudicial medically to the patient. Where an appreciable amount of work is involved in doing this it could in the Minister's view reasonably be regarded as equivalent to the preparation of a report, so that the doctor or dentist would be entitled to charge a suitable fee. The amount and quality of the work will, however, vary so much that is seems undesirable to suggest any standard fee or scale of fees.

7. No hospital charge should be made for the supply of information in the circumstances described in this memorandum, unless significant additional expenditure has to be incurred specifically for the purpose of providing it.

8. All requests for information or for the supply of documents concerning the reception, detention, or discharge of patients received under the Lunacy and Mental Treatment or Mental Deficiency Acts should for the present be referred to the Board of Control as hitherto.

9. The principles in this memorandum are also intended to apply to records of patients treated under

under Section 5 of the National Health Service Act, 1946 in so far as they concern the activities of hospitals. But since these records mainly arise from the private work of consultants, any request for information which involves possible claims against the hospital or the consultant must be decided upon by agreement between them.

MINISTRY OF HEALTH
SAVILE ROW
LONDON, W.1.

To: Regional Hospital Boards,
Hospital Management Committees,
Boards of Governors.

23rd September, 1959,
94150/19/15D.

APPENDIX II

SECTION 1 OF EVIDENCE ACT, 1938

1 - (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say -

(i) if the maker of the statement either -

(a) had personal knowledge of the matters dealt with by the statement: or

(b) where the document in question is or forms part of a record purporting to be a continuous record made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(ii) if the maker of the statement is called as a witness in the proceedings;

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or

if all reasonable efforts to find him have been made without success.

(2) In any civil proceedings, the Court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in sub-section (1) of this section shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence -

(a) notwithstanding that the maker of the statement is available but is not called as a witness:

(b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the Court may approve, as the case may be.

(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him

with his own hand, or was signed or initialled by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the foregoing provision, the Court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner, and where the proceedings are with a jury, the Court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

APPENDIX III

In the following paragraphs are set out briefly the statutory provisions which apply to the assessment of experts' fees in legal aid cases:-

A. Civil Legal Aid Cases

1. In all civil cases, including domestic cases in Magistrates' Courts, in which legal aid is granted, the sums to which a solicitor is entitled, both in respect of his own costs and in respect of the out of pocket expenses paid by him, can be determined only at the conclusion of the case, either on a taxation by the Court or on an assessment made by a Legal Aid Area Committee of The Law Society. A solicitor who needs to call an expert witness may, however, apply to an Area Committee for prior authority to do so and, if this is granted, the Committee will state the maximum fees which he may pay. The fees specified by the Area Committee will, save in the most exceptional circumstances, be allowed on the taxation or assessment at the end of the case and the solicitor may, therefore, freely agree an expert's fee as soon as the authority of the Area Committee has been obtained.

2. An Area Committee will specify fees of an amount which, in their view, is reasonably sufficient to compensate the witness, no element of subsidy is expected, but the Committee will not necessarily authorize the payment of the fee asked for by any particular expert. In particular it sometimes occurs that a solicitor seeks authority to instruct a professional witness of an eminence and standing that is not required for the particular case in question. The Area Committee will, in such a case, authorize the payment of fees commensurate with an expert whose qualifications and standing are appropriate to that case.

3. This procedure may normally be used only where the question of calling an expert witness arises, but where a medical witness is being called in his professional capacity as a witness of medical fact, applications may be made through an Area Committee to the Law Society in an

exceptional case for prior authorization of the witnesses fees.

4. If no authority is obtained the solicitor will be entitled to be reimbursed only to the extent that the taxing authority considers reasonable. If the solicitor pays, or has paid, a higher fee, he must bear the difference out of his own pocket because he is not permitted to recover the balance from a legally aided client.

B. Criminal Cases

5. In most criminal cases the fees which may be paid to professional witnesses are regulated by the Witnesses Allowances Regulations 1955 to 1962 and are paid by the Court out of local funds. In the remaining cases they are payable by the party which calls the witness, save where the case is conducted under a legal aid certificate in which case they are payable out of the Legal Aid Fund. Each class of case is dealt with separately:-

(i) Cases in which fees are regulated by the Witnesses Allowances Regulations

6. In all cases at Assizes and Quarter Sessions and in all indictable offences tried in the Magistrates' Courts, the fees payable in respect of professional witnesses called for the prosecution, or in a legal aid case, for the defence, are decided by the Court. The fee payable to a witness of fact may not exceed £8. 8s. -d. per day in addition to travelling and subsistence allowances but the amount of the fee to be paid to an expert witness can only be decided by the Court after the case is concluded. There is no procedure whereby the solicitor can obtain prior authorization, as he can in a civil legal aid case, but the Clerk to some Courts are helpful enough to give guidance on the amount which is likely to be allowed. The Joint Committee recommend that an official and authoritative means of obtaining prior authority to engage and pay an expert in criminal legal aid cases should be introduced. In a criminal legal aid case, at present, the solicitor will be liable to pay from his own pocket the difference between any fee which he agrees to pay to the professional witness and the fee subsequently allowed by the Court.

(ii) Legal Aid cases in which fees are not regulated by the Witnesses' Allowances Regulations

7. In non-indictable cases tried in the Magistrates' Courts, where legal aid is granted the fees payable in respect of professional witnesses are assessed by a Legal Aid Area Committee who will allow a proper and reasonable fee. Furthermore, a solicitor may obtain from the Area Headquarters a firm indication of the fees which he may incur in any particular case.

(iii) Non-Legal Aid cases in which fees are not regulated by the Witnesses' Allowances Regulations

8. In all non-legal aid cases the fees to be paid are not stipulated or regulated by the Court and the solicitor can properly look to his client for reimbursement of the fees which he agrees with any professional witness whom he instructs.

9. To summarize, therefore, as a general rule the solicitor should attempt to agree fees with the professional witness before any services are rendered, but in any case in which he is not free to do so he should expressly inform the witness of the position and agree the method by which the fees are to be ascertained.

APPENDIX IV

The Joint Committee wishes to express its appreciation to the following organizations for their views -

Association of Industrial Medical Officers
Association of Police Surgeons
Coroners' Society
Medical Defence Union
Medico-Legal Society
Medical Protection Society
Ministry of Pensions and National Insurance

and expresses its thanks to a number of individual members of the medical profession who submitted comments.

APPENDIX NO. 2

PLAINTIFFS REPORTS

5th December 1962

re: Mr. -------

I examined this man at the request of his solicitors on 30th November 1962. He is at present in England doing a market survey for a German firm who are engaged in the same field of activity in which he was previously employed viz woodworking machinery. The history, I am afraid, has borne out my own gloomiest prognostications. After his last visit to this country he returned to Switzerland and tried to get employment. He managed to obtain a position as a filing clerk in the Income Tax Office at Neuchatel, working mornings only from 7.30 a.m. to 12 noon six days per week.

However he found himself quite unable to carry on with this job. His symptoms became much worse, that is he became more depressed and exhausted and on returning home from work found that he was unable to do anything but sit in a chair because he was so exhausted. His behaviour made his wife nervous and ill, so much so that her own doctor had to be called

in. Mr. ---- became so upset at his inability to carry out this very simple job that he says he seriously contemplated suicide and that if it had not been for his wife and children, he would have killed himself.

He was seen by his wife's doctor who put him on a variety of medicines and eventually he was advised to give up work on a medical certificate. He only did three months in this very simple employment. A psychiatrist was then consulted and he advised him that he should stay with his family for a time at St. Gallen and after a rest here he obtained this three weeks market survey work to come to England.

He says that he has had a terrible shock this summer when he received a request for the repayment of 98,000 Swiss francs from SUVA, a sum of about L8,000. All this had added more fuel to the flames and he can speak of nothing else but his troubles and his legal case, the Insurance Company etc. During the hour in which I saw him he kept up a continual flow of talk throughout the interview, all connected with his case. He becomes more and more involved in the details of the people who stabbed him in the back, various documents which he shows me, certificates from doctors and all in all he remains in exactly the

same sort of state as he was when I first saw him. He is now faced, he says, with the possibilities of another legal case once the case in the English courts is finished with, for he intends to contest the claim by SUVA for the 98,000 Swiss francs.

OPINION: In a nutshell I have very little to add to my original report. I am afraid I regard him as totally unemployable. He himself thinks that he may be able to manage as an agent on commission but I very much coubt whether he will be able to do this in a highly competitive world, and also if anyone, who knows of his past history, would be willing to employ him. I again have the feeling that he is a litigious personality and that the concern and over elaboration of his case is a symptom and not entirely the behaviour of an aggrieved plaintiff.

However, the important thing is that I see no reason whatsoever to change my very gloomy prognosis about his future. I cannot envisage this man working at all, and I rather think that even when the case is disposed of, he will get himself involved in further litigation, possibly elsewhere and so the whole terrible process will keep going on.

M.D., F.R.C.P.

AGREED

Dr. -----
Specialist
Internal Medicine

Neuchatel

November 13, 1962

Medical Certificate

Mr. ----- has undergone regular medical treatment since April 12, 1962, following upon the accident suffered by him on November 28, 1958, which has handicapped him in his capacity to work and has modified his professional qualifications. To give himself something to do, and even though he still suffers the sequelae of his accident (insomnia, headaches, buzzing in the ears, pains in the left leg), Mr. ----- has found employment as a half-day assistant in the Finance Department of the Canton of Neuchatel, commencing in mid-July. This post, however, involving very monotonous work, is far from giving him the professional and financial satisfaction required for any improvement in his depressive state. In consideration of the gravity of the anxious and reactive depressive state which I observed in Mr. ----- during our most recent consultations, I order him to take a medical leave starting October 15, 1962 by way of therapy,

and to look for employment in keeping with his intellectual capacities and his tastes.

Dr. ------

NOT AGREED

Dr. ---------

10th July, 1962.

re: Mr. -----

Since my examination of this man, I have had the opportunity to discuss his pre-accident personality and behaviour with Mr. -----, Managing Director, ----------, and I have also re-examined the question of his being a difficult man to get along with before the accident. Mr. ----- has known him since 1954 and has had him down to his house and has also accompanied during a trip to Europe. I think Mr. ----- can claim that he knew ------ pretty well before the accident and that ----- was a man of quite outstanding abilities as a salesman. He was a persistent salesman, a very strong character, very well liked and very good at his work.

Mr. ------ never saw ----- taking any pills; he did not drink excessively. Although he was always full of energy and bubbling over with stories and repartee, he never seemed to overdo things. ------ was a brilliant linguist and seemed in the words of Mr. ------ "very very normal."

Since the accident there has been a complete change in his personality. ----- is now preoccupied with himself, feels he is being persecuted by his old company, is rude and not at all thoughtful of other people as he was before. Mr. ------ feels he will never be able to work in any position similar to the one he held before the accident. He would be unable to sell anything.

Perhaps I should therefore modify my view that he was a difficult man to get along with before the accident. I think my view that he will not work again is borne out by Mr. ------'s account of his present state as seen by a fellow business man.

M.D., F.R.C.P.

NOT AGREED

Dr. --------

15th June, 1962

Re: Mr. -----

I examined this man at the request of his solicitors on 13th June 1962 having previously read through a file of documents from SUVA and the various medical reports which have been made on him. In view of the very voluminous file, I intend only to summarize the story, and to give my opinions and findings.

He sustained a serious head injury on 28th November 1958 when the car he was travelling in was in collision with a bus. His retrograde amnesia, that is, his last memory before the accident, extends to 15 minutes before the accident, and his post-traumatic amnesia is 6½ weeks. These both indicate a very severe head injury. Mr. ----- has described his condition during this period and how he was treated. In a nutshell, since the accident, Mr.---- has been unable to resume his pre-accident efficiency and in fact has been unemployed practically speaking since the accident, apart from a brief period June - July 1959 and two ten-day periods at the Hanover Trade

Fair in 1961 and 1962. Dr. ---'s report should be referred to for full details of his pre and post accident work record. The reasons for his unemployability are that he developed a marked personality change following the head injury. I will deal with his present condition first.

He now complains of insomnia, pain in the left hip, knee and ankle, tiredness, bouts of depression, lack of sexual drive, loss of confidence, irritability and excitability. His left leg feels weak and he cannot walk more than a few hundred yards without his leg feeling tired. He is still deaf in the left ear and has indescribable feelings in the left side of his head. He concentrates poorly and his memory and grasp of events are not as good as before the accident. He denies having any of these symptoms before the accident.

His family history is of some importance, for both his father and his niece have suffered from depressive illnesses. In his personal history the important facts are 1) He has always been a rather litigious individual and I am inclined to think he was a difficult man to get along with before the accident 2) He was a man of excessive energy - at least so he says. He worked fifteen hours a day and never felt tired,

built up his department's business from 5% to 60%. 3) He never suffered from any nervous breakdowns or any serious medical or surgical disability 4) He is inclined to blame others of "ganging up against him" as it were. For instance he regards his dismissal from ----- ----- as having been engineered by certain individuals; he was badly treated by the ----- Embassy in Paris when he worked there and he, I believe, had trouble with a firm he worked for at the Hanover Fair in 1961.

Mentally he is now preoccupied with his various symptoms and with his case; the voluminous file I regard as pathological. He talks a great deal, in far too much detail, and is very self-centred. Apart from this I could find no abnormality except for a defect in concentration and in the retentive aspects of memory function.

Physically he is a healthy man of fine physique. There is a hysterical weakness of the left leg but no signs indicating any residual damage to his nervous system apart from the mental symptoms.

Opinion: Medically he is not a difficult case. He was a man of a certain personality, somewhat difficult, energetic and self-centred before the accident who since the accident has shown a change in his

personality. This consists of an exaggeration of his previous traits. But in addition he has become unemployable, largely I think because he is unable to function at his previous level and is unprepared to function at any other. There is undoubtedly a constitutional factor here too (see his father's and niece's illnesses) and the picture he now presents is the result of a severe head injury occurring in a man of a particular temperament and constitution. There is too, most probably, an element of compensation-neurosis here, as shown by the over-concern with his 'case'.

The trouble is that in these cases the prognosis for work is very poor. If a man is in the state in which he is, 3½ years after a head injury, then full recovery is highly unlikely. He will never get back to his previous work capacity; and being the man he is, the fact that this is so will probably mean he won't get back to anything. I think the Swiss Insurance Authorities and Dr. ----- are being most unrealistic about their 60% working capacity. Res ipsa loquitur - he hasn't got back to any kind of work 3½ years after his accident.

My opinion is that he won't work again and that his symptoms will remain as they are at present.

Lastly, I don't think anyone will dispute that he must have suffered severe brain damage affecting those parts of the brain more particularly connected with mental functioning. This brain damage released, as it were, the constitutional defects in his make-up, with the result that we get the picture he presents today - a mixture of both "functional" and "organic" manifestations.

B.Sc., M.D., F.R.C.P.

NOT AGREED

From Mr. ----------

20th March, 1962.

Your Ref. W/S/5094

To: ----------

Dear Sir:

Re: Mr. -----
Neuchatel, Switzerland

Previous reports on the early post-traumatic and the convalescent phases of Mr. -----, following the Head Injury he sustained on 27th November 1958, were made by me on the:

1. 22nd April 1959
2. 4th April 1961

Subsequent to the times of these reports, I have seen Mr. ----- on several occasions and I have received a number of letters from his detailing events. I am able, therefore, to substantiate many of the statements and comments contained in the communications that deal with observations concerning his post-traumatic psychological and physical states.

In my opinion:

1. The injuries sustained on the 27th November 1958 are responsible for the events as described in the documents referred to in your letters dated 17th January 1962 and 19th February 1962.

2. These injuries have been directly responsible for the loss of his job with --------- Ltd. and for the difficulties in respect of other appointments.

3. As I am not absolutely conversant with the requirements of the post, I find it difficult to make any founded opinion on his adequacy. From the documents, it would appear that his lack of co-operation with others prejudices his chance of comparable employment.

4. I believe that Mr. ----- is quite capable of holding down a post with satisfaction to others and to himself but I would anticipate some possible difficulties, for he could be exacting and exasperating, according to his relationship with others.

On this matter, the opinion of a first-class psychiatrist would be essential.

5. Some limitation on his working life would be subject to the influence of other factors; e.g. Should he develop a tendency to any blood vessel disorder, such as arteriosclerosis, at some subsequent stage, then the consequence of his brain injury could assume further detrimental influence.

The intervention of post-traumatic Epilepsy has not arisen, but this possibility cannot be completely ignored. Such a sequel of course would add

considerably to the problems involved.

Altogether it would be unwise to say that some limitation on his prospective working span in not to be anticipated. Any precise view is not feasible to determine.

F.R.C.S.
Neurosurgeon.

AGREED

Cantonal Hospital, Zurich
University Psychiatric Polyclinic

Zurich
February 20, 1962

Dr. -----

Subject: ---

Dear Dr.,

In compliance with your wish I am submitting the following report on Mr. -----'s condition:

"In my report dated August 2, 1961 for SUVA it was established in detail that Mr. ----- at the time of the examination still possessed a working capacity of 60%, the handicap having to be attributed to the accident suffered on November 28, 1958. It can be seen at once from the course of treatment described in the report that in the period from 1959 to 1961 full working capacity was never present. If the family doctor in 1959 assumed otherwise, he was in error because, with the possibilities of examining the patient at his disposal, he was not in a position sufficiently to grasp the far-reaching alteration of personality suffered by Mr. ----- as a consequence of the accident. It appears to me to be

equally beyond doubt that the differences which in 1959 led to Mr. -----'s dismissal from the firm of ---------- have essentially to be accounted for by this accident-induced alteration of personality. Should you require further information, I can gladly answer any more specific questions you may have that fall within my competence.

Very truly yours,

Head Physician.

AGREED

Dr. ----------

Specialist

Internal Medicine

Neuchatel

January 30, 1962

MEDICAL CERTIFICATE

As a consequence of a traffic accident Mr. -----, Neuchatel, suffered in 1958 a grave cerebral concussion which has entailed his definitive exclusion from active military service; the diagnosis mentioned in his service record is the following: absolute exemption by reason of operated post-traumatic encephalopathy.

Dr. --------

AGREED

Prof. --------

August 8, 1961

To ----------

Re: ----------

In your letter of 5.6.1961 you requested me to examine -----, who had been involved in an accident, and to give my opinion with regard to the following questions:

1. Diagnosis?
2. What are the consequences of the accident?
3. Possible therapeutic suggestions?
4. Working capacity?
5. What insurance settlement do you propose in the event that treatment should no longer be necessary?

I herewith comply with your request and have to inform you that on 30.6.1961, after studying the documents, I submitted the examinee to a thorough neurosurgical examination on an out-patient basis and then requested an expert psychiatric opinion. This was given by Dr. ------, who kept the examinee in the division of the University Psychiatry Clinic, Zurich, from July 17 to 21, 1961. This detailed expert

opinion is enclosed with my report. As the previous history has been thoroughly discussed in the expert psychiatric opinion, I am omitting a reproduction of same in my report and am giving simply the findings of the examination made on 30.6.1961.

Findings of the Neuro-surgical Examination:

(a) Subjective complaints mentioned by the examinee:

1. Insomnia, on an average sleeps not longer than 3 hours.
2. Pains in left foot and left hip.
3. Constant buzzing and ringing in left ear, going in hand with a slight decrease in hearing.
4. Marked decrease in libido sexualis.
5. At night occasional feelings of insecurity and giddiness.

(b) Neurological Condition:

The examinee's appearance corresponds to his age, well-nourished and robust. Sensorium free.

Head: can be moved freely in every direction, neither sensitive to tapping nor to pressure.

Nerves of the brain: I: smells the usual olfactory substances quickly and accurately on both sides.

II: Papillae normal in colour, sharply demarcated, not prominent. Field of vision, on the basis of a summary examination, intact.

III, IV and VI: Pupils round, medium in width, right=left, react quickly to light and convergence. No Nystagmus.

V: Corneal reflex lively, right=left, sensitive and efferent oB

VII: Symmetrical and rich innervation.

VIII: Hears whispers on both sides, left distinctly worse than right.

IX - XII: oB.

Extremities: Tone, state of nutrition, motility standard, right=left. No ataxia on either side in finger-nose-finger test and knee reflex. No disruptions of sensitivity.

Reflexes of biceps, triceps and radius-periost lively, right=left. Patella and Achilles' tendon reflexes lively, right=left. Normal reflex on the soles of both feet. Reflex of abdominal walls weakened to a high degree, those of the lower walls cannot be induced 100%.

Upright posture and gait: Nothing noticeable.

Spinal column: Can be moved freely, neither sensitive to tapping nor to pressure. Distance of fingertips from floor 0 cms. Lasegue's phenomenon negative on both sides.

Hip joints: Movement of thigh in hip joint on either side unrestricted and free of pain.

The X-ray photographs taken of the pelvis led to the following findings: "Bone structure of pelvis and prox. femur thirds intact. Ileosacral joints regular on both sides. Moderate sclerosis of pelvic sockets of both hip joints with signs of of peripheral swellings. Fissures on either side of hip joint normal width. Head of femur normal. Osteophytary deposits on crista iliaca,

both sides, as well as on ischial processes, both sides. From the radiologist's point of view, there are no grounds for believing that there is a coxarthrosis but probably a tendoperiostosis with osteophytary deposits on the ischial processes and the spinae iliacae, both sides."

Internal organs: oB.

Electro-encephalograph findings: of 30.6.1961, see enclosure.

EVALUATION :

As the neurological findings are extremely scanty, the assessment of the subjective complaints has, in the first instance, to be based on those of the psychiatrist. My colleague Dr. ----- has shown convincingly that it is probable there has been a post-traumatic psycho-organic personality change, which has brought about a 40% reduction in working capacity. The subjective neurological symptoms such as a disturbance of the rhythm of sleep and of the sexual functions are in keeping with this post traumatic change and point to damage done to brain-stem and mid-brain. Considering the severe injury to the cranium, it is to be assumed that the discrete symptoms such as the buzzing in the left ear and the weakening

of the abdominal wall reflexes are also based on damage to the brain-stem. This assumption does not contradict the EEG findings, which show a slightly diffused abnormity. Whether the pains in the left leg are a vestigial symptom of the hemiparesis carried out on the left side or are to be regarded as arising from a tendoperiostosis with osteophytary deposits on either side of the ischial processes and spinae iliacae, has been left undecided.

The subjective neurological disturbances are so discrete that, over and above the psycho-organic change, they affect the examinee's working capacity only to a negligible degree. For this reason I concur with the statements made by the psychiatrist and confirm his conclusions as follows:

(1) Diagnosis: Post-traumatic encephalopathy with salient emergence of a psycho-organic personality change.

(2) These consequences are very likely to be the result of an accident, arising from nothing else.

(3) With regard to therapeutic suggestions, it is recommended that in the treatment of insomnia and the pains in the left foot and left hip tranquillizers such as Miltown or Librium should be dispensed.

(4) Working capacity at the present time is estimated at 60%.

(5) It is proposed that a 40% pension should be paid for 2 years, this pension then to be reviewed by a psychiatrist.

Yours faithfully,

Sign. ----------

Encls: Your documents
Expert psychiatric opinion
in duplicate with account
EEG with findings
My account

AGREED

Cantonal Hospital, Zurich
Psychiatric Clinic of University
Observation Clinic

Zurich, 2nd August, 1961

Professor Dr. ---------
Director of Neurologic Clinic
Of the University of the
Cantonal Hospital

Z U R I C H

Concerning: ----------

Dear Professor,

With your letter 3rd July 61 you ask me for a psychiatric report about Mr. ----- you have yourself been requested by the Swiss State Insurance Lucerne the 5th of June 1961 to reply to the following questions:

1. Diagnosis
2. Which consequences of the accident still exist
3. Proposal for therapy
4. Which is the working capacity
5. Which suggestions you make regarding settlement with the insurance in case further treatment is no longer necessary.

You mention that a very pronounced reduced reflex of the stomach is noticed. The electroencephalogramme is not abnormal but which does not exclude a defective state. A potential easely suggesting epilepsy would

exist post-central both side and right central (near gap between bones).

For this report the following documents were available:

1. File of SUVA documents re Mr. ------.
2. Verbal information received from Mrs. --------, wife of the patient at our clinic on 11th July, 1961.
3. Several documents concerning law case with his former employer -------, as well documents re former occupation in the ------ diplomatic service.
4. Examination and observation of the patient during his stay at the clinic 17th to 21st July, 1961.
5. Written information given by his brother ------ town councellor (barrister and former resident of Court of St. Gallen) dated 26th July 1961.

Prehistory to the present report based on SUVA documents

Mr. ------ former sales manager and confidential clerk of ------ now -------, was involved in a serious car accident on the 28th November 1958 whilst on a business trip in London. The car of a business associate in which patient was seated collided with a bus causing to the patient a severe brain trauma. In a report dated 2nd February 1959, Mr. ------ , National Hospital, London, informed Dr. ---- his house

practitioner that patient was still seriously disturbed and disorientated. Also weakness in the left hand and reflex disturbance in the upper and lower left extremities existed. His unrest and confusion caused great difficulties for nursing the patient. Only about six weeks after the accident confusions cleared and from this time the condition of the patient improved quickly. End of January 1959 he could leave the hospital in London and then return home.

On the 31st March 1959 he took up work 50% (Suva document 6) and the 3rd June he worked full time (Suva Document 8). On the 27th August 1959 the house practitioner in ----- Dr. ------ informed Suva (document 9) there did exist without doubt still psychic disturbance and there did exist an affective change of character. The patient therefore had professional difficulties. A neuro psychiatric examination was arranged with Dr. ---- in Zurich. Dr. ------- writes (Document 10) there were still pronounced disturbances of psycho-organic and affectivity. On one side the patient is tense on the other hand hypomanic with talkativity, flight of ideas and high spirit. He was not inclined for aggravation and seems in the contrary optimistic for the future. The

difficulties with the employer were not consequences of the accident as they did exist already before the accident. These psychic disturbances are most probably consequences of the accident.

The former employer stated that the patient was irritable in his personality pre-traumatic was very quickly excited and talked a lot. Already before the accident he complained about insomnia, loss of memory, stomach troubles and various other nervous disturbances. In the behaviour of the patient with regard to the time before the accident not the slightest change had occurred.

On the 11th January 1960 the former house practitioner informed Suva (document 15): Patient seems much quieter indicates still the formerly described numbness on the left side but does not believe that there will remain after effects. However Dr. ----- Neuchatel writes to Suva about symptoms before all from the psychiatric point of view on the 23rd October 1960 (Suva document 16) which are without doubt consequences of the accident of the 28th November 1958. Patient is noticed with his "submanic" behaviour a certain irritability and an unjustified carelessness. These are typical symptoms of psycho-organic syndroms.

Cucciculum vitae given by the patient

Mr. ----- was born in St. Gallen as the youngest child of 4. Family of comfortable situation, father very lively and died probably at the age of 67 with cancer*. Mother very temperamental of Italian origin. All four children in good health. The only brother is a barrister and town counsellor in St. Gallen. He is of an entirely different temperament than patient namely reserved, quiet. The daughter of his sister suffered at the age of 24 of depression and stayed in a psychiatric clinic. Patient is married since 1952 to a former secretary of Swiss French origin and has two healthy children of 6 and 8 years.

After his high school, patient went to commercial college and finished with matriculation. Did his military service and was promoted lieutenant in 1943. Studied at the University of economy in St. Gallen and went after few terms to praxis. He was first working in the war department for industry and changed at the end of the war to the Swiss diplomatic service and was attached to the Swiss Consulate in Jerusalem. During the Jewish Arab war the staff of the Consulate was evacuated, 1948, and he stayed behind alone and

---

* During the last years of his life i.e. after the death of mother he suffered of depressions in opposition to his earlier life when he was very lively and sociable.

was acting consul. After the situation in Jerusalem became normal he was transferred to the Swiss Legation in Cairo. Had typhoid fever and was afterwards posted on medical advice to Europe. Was attached to Swiss Legation in Paris. Owing to unsatisfactory and subordinated work there he quitted the diplomatic service at the end of 1951. The patient complained in this connection about the unpleasant conditions of the staff of the foreign office. As the administration did not treat him with regard to salary when he left he had to go before the Federal High Court of Switzerland. His claim was protected. Patient was in a position to prove his saving with original correspondence about this period. There are no signs that he had to leave the diplomatic service with regard to incapacity or not getting along with his colleagues or superiors, as one could suppose according to information given by his former employer to SUVA.

From 1952 to 1959 patient was employed by machine factory --------- in Brugg. Was in charge of export department and was promoted successively and in 1956 confidential clerk and export sales manager. He developed this department from a very modest level and he was very successful in his work. In this

enterprise did, however, exist an unhappy working mentality and tension existed from time to time. After his resuming work after accident in June 1959 the tensions had increased so strongly which led to the suspension from his function by the chairman after difficulties with the management. (July 1959). The employer cancelled afterwards his working contracts. Patient gave up his residence in Brugg and moved with his family to his parents in law in Neuchatel.

It is not the duty of the examiner to take position with regard to the patient's difficulties with his employer ---------. However the claims of the patient must have been justified as the employer had to accept a settlement out of court of his claim which had to be brought before the commercial court of the Canton Aargau. (Case for not fulfilling correctly the working contract with regard to payment of salary). Since the patient had no regular occupation. In the first half of 1960 he was in connection with an American firm but he had to withdraw as this enterprise was not working seriously. A similar experience he made with a German firm. Under these setbacks he suffered very much and he came into a state of depressions, (May 1960).

Present living conditions: Patient lives with his family in Neuchatel and tries to build up a new position. He intends to make himself independent and to act as representative for foreign companies. His present living expenses he is able to pay out of a loan from a friend.

Information given by his wife: Wife says patient is still changed considerably and has no inhibitions. Tells anybody of his problems in length. Does not support any contradictions, gets furious, insults her and makes reproaches when she tries to stop him in order to avoid that he gets compromised. Gets excited for little things. Patient was always temperamental and quick minded but today he speaks continuously, makes scenes and quarrels what was never the case before. He sleeps badly and only few hours per night in spite of his solid living. With regard to hunger and thirst no change after the accident was noticed. The sexual desire, however has diminished, for one to two months he has no desire. Patient suffered under this change.

In 1959 patient spent money in an exaggerated way. After his dismissal from ------- he phoned to everybody telling them his problems. Had telephone bills of over Fr. 160. - per month. Family lives

from a loan received from a rich friend. Memory of patient was bad after the accident but since has recovered.

In the Summer 1960 was in a state of depressions. They began when he had to realise that the American firm with which he had made connections was not serious. Patient took his failure very hard, wept like a child, complained and followed her all day to be consolated. Dr. ------ prescribed Librium what made him quieter.

Brother: Informs in writing that patient was vital, active and full of energy in his professional activity. Patient was always temperamental and impulsive. Was capable in contacting people, experienced in dealing with family and acquaintances. Since the accident considerable psychic changes have occurred. Patient became irritable, periods of deep depressions changed with euphorie in which he over estimates his situation. He became lengthy, and tells over and over the same story. His change of character became not only obvious to him but similar observations were communicated to him spontaneously by friends and common acquaintances.

Examination and observation during his stay at the clinic.

Complaints: Pains in the left hip and left knee and occasionally all over the left side. No longer capable of practising sport. Tries not to bother about this. When in company or occupied forgets pains but when alone pains disturb him considerably. Noise and humming in the left ear. Cannot sleep correctly, about three hours per night, whether he goes to bed at 10 or 12. Strongly reduced sexual desire.

The interview of the patient was very difficult. Any discussion, whatever it might be came after a short while to the conflict with his former employer ---------- in Brugg, and what Mr. ------ found about his condition. Patient can be diverted very difficulty from this topic and is always returning to that. Another frequent topic are his relations to various highly situated persons in Switzerland and abroad. Often, without noticing he tells the same stories several times and looses himself in details. What he tells is understandable and continuous. His self criticism and feeling for distance in human relations are much smaller than one could expect from his family background and education. He is always

in a good mood and optimistical for the future and of a pronounced self confidence. Subjectively he thinks he has not changed in his character since his accident, however he brings his depressions in connection with the after effects of his accident.

At the Clinic He attracted the attention by his talkativeness and activity. His unceasing discussions with the nurses and phone calls and correspondence attracted the attention. He also made sometimes personal remarks and told not always inappropriate stories, however without being rude or offensive. Generally he was good tempered, jovial and co-operative. It was noticed that he slept very little and got up as early as 2 or 3 in the morning. We have made extended experimental examinations.

In ordinary discussions there were no signs of disturbance in his memory, concentration and in noticing things. In the test examinations only results below the average could be obtained. In the arithmetic test according to Kraepelin in which during one hour simple numbers are added his curve of efficiency is not normal. People in a healthy condition obtain an obvious increase of efficiency and the maximum of efficiency is reached after one hour. The patient reached maximum after 10 minutes

and then a continuous decrease. Towards the end of the hour he tried once more very hard but only very irregular results were obtained. Errors remain in the normal. Curve shows an over tiredness and a slight weakness of concentration. Also the test of fresh memory of the patient the result is below the average. Meggendorf pictures. He noticed unclearly and remembers often only details, he can mention only 6 of 10 pictures where as a healthy person remembers easily 7-8 pictures. To repeat a story read to him is very much shortened right in the sense however. Repeating numbers he reaches a result of an average. The test of intelligence according to Hamburg-Wechsler he reaches a normal result. A comparison of the various results of the series of tests does not show an organical decrease of intelligence. Phatological is the result of the Rorschach shape interpretation. Many repetitions and with a considerably reduced time of the reaction. The thinking of the patient is not very rich. With an organical practical intelligence the control of reality of his thinking gives a bad test. Also the control of affects is not always good. If patient reacts affectively than more not stable. During the test the patient remarks a lack of ideas, is quite lost which is in opposition to his normal

Loghoree. Signs of affective displacement or increased fear do not exist. The whole Rorschacher protocol indicates more apsychorganic change of personality than a hypomanic depression.

Physical examination: The patient is tall, 190 pounds weight in good general condition. A reflex in the stomach could not be noted. The hearing left is reduced to whispering. Blood pressure: 145/90 HB 101%. Leuco 6200 with normal distribution with no phatological parts. Wa-R in blood negative.

Conclusion

The present psychologic picture of the patient is marked by a pronounced talkativeness, a certain activity and a general high spirit with reduced self criticism and unjustified optimism. The signs are not easily noticeable in a superficial contact with the patient but if one has to do with the patient longer and above all to live with him, it gets difficult. He tires the people around him by telling always the same story in a jovial way, he gets slightly insisting and looses the finer sense of orientation what is necessary in human relations. The tests show a discrete disturbance of memory, capability of noticing and a slight weakness of concentration. The Rorschacher test indicates a slight

psycho-organic change of personality. Subjectively the patient does not notice this disturbance.

The present psychiatric average alone does not permit a diagnosis. The present result of examination can only be understood in connection with the anamnese. From the pre-history of this case we know that the patient suffered in November 1958 a severe brain trauma with commotio and contusio cerebri. During weeks existed considerable disturbance which cleared slowly. Most amnestic symptoms go back to normal in a relatively short time, however changes of personality remained, including the main symptoms as described self criticism, active slight hypomanic behaviour as well as to given information by his wife an increased excitability and irritability. All these symptoms fit into the well known psychophatological state of organical or brain psychosyndroms.

The chapter pre history according to the file of SUVA shows clearly that this change of personality is in direct connection with the accident and is most pronounced directly after the accident. Since there is a slight improvement. The change of personality could only be seen in comparison of his pre-traumatic state with the post traumatic state about the former state no medical report however,

exists. Therefore one depends on the saying and information given by the persons questioned. The former employer --------- tried to make SUVA believe that the patient was always excitable and irritable and a change after the accident did not occur. In opposition to a careful questioning of his wife and a written statement given by his brother confirm that an obvious change of character of the patient has occurred since the accident. On the occasion of the medical examination after the accident the patient was noticed as pathologic. It cannot be believed that the patient in his present state could occupy an independent, responsible and executive position. This however, was possible before the accident as the employer was satisfied with his work otherwise he would not have been promoted. Therefore more reasons speak for a marked change of character of the patient after the accident.

Differential-diagnostic in the first instance a zycloid with psychopathie with hypomanic depressions have to be taken into consideration. There are no proves that the patient had gone through marked changes of spirit before the accident and the psycho-organic symptoms indicate a brain damage. It may be right, however, that the patient was before the accident

full of initiative, talkative, easy in contacting people and quite independent. That these characteristics reached a pathologic extent is not to be admitted. It is known that in view of a psycho-organic syndrome a distortion of the earlier existing character arose so that the patient became a caricature of his healthy personality.

It is very difficult to answer the question as to his working capacity. In principle it is impossible to express the fact of change of personality and the reduced power of earning capacity in figures. This is especially the case for specific positions on a higher level. Unfortunately practical experiences with regard to the working capacity of the patient are not available since the accident. His failure in the machine factory ---------- was also due to facts which were not in direct connection with the accident, namely intrigues and rivalries. In analogue cases with other patients a reduced earning capacity in view of a marked change of personality has to be admitted. Probably the reduction is at least 1/3. The further outcome is uncertain but an improvement may be expected as well as better adaptation to the circumstances in the future. A psychiatric treatment is only necessary if

new considerable depressions arise. However, it could be tried to treat the insomnia and the exaggerated activity with medicines such as Librium in the afternoon and in the evening.

Conclusions and suggestions to SUVA questions.

(1) There does exist for Mr. ----- a psycho-organic resp. brain local change of character, the disturbances concerning mood of affectivity and drive are surpassing the amnestic functions.

(2) The psycho-organic change in personality is with great probability the consequence of the brain trauma of the 28th November 1958.

(3) A psychiatric therapy for the patient is only necessary when depressions arise again. It should be attempted to treat the insomnia.

(4) The present working capacity can only be theoretically estimated. Owing to the marked change of character an important reduction of his working must be admitted.

(5) I suggest the payment of a pension based on a 60% working capacity and a revision after 2 years, event examination at the clinic. At that time

it should be estimated how he succeeds in adapting himself to the new circumstances and how he can be reintroduced to the working life.

Yours sincerely,

sig. ----------

PD Dr. -------, in charge of the psychiatric clinic

NOT AGREED

From: Mr. ----------
Private Consulting Room
The National Hospital,
Queen Square,
W.C.1.

TERMINUS 3958

4th April 1961.

Second Medical Report on the Case of:

Mr. ------ Now aged 38 years.
Neuchatel, Switzerland.

Previous Report: 22nd April 1959.

In the interim, Mr. ----- has been through a somewhat disquieting period as employment has proved insecure.

He returned to the post which he occupied prior to the injury on the 30th March 1959, on a part-time basis. On the 3rd June 1959 he resumed full-time work. Unfortunately he was discharged altogether from the firm -------- on 23rd July 1959. (Salary continued until 31st December 1959).

On the 1st January 1960 he commenced duties with an American firm. In this post he remained for seven months. Regrettably, on an occasion during which he became "excited", he uttered what were unacceptable remarks to his superior in consequence of which he was dismissed.

He was liable to further Military Service at this time but was not acceptable on medical grounds, being indisposed by an episode of Depression.

Since that time he has had difficulty in finding an appointment, for prospective employers have been unwilling to accept the responsibility of engaging him.

PRESENT COMPLAINTS

Pain of a burning character in the left lower limb (hip, knee and foot).

Noises like bells in his ears.

Tires easily (even with a business discussion).

Disturbed sleep: he goes to sleep without difficulty but awakens easily then he is unable to go to sleep again.

Giddiness occasionally on change of position.

Mood: His period of Depression continued until three months ago. He ceased to take any tranquilising drugs two months ago.

He was never liable to Depression prior to the head injury.

His temper now is good. He does not get "excited" any more, though he becomes irritable when talking over matters concerned with the Company. He is not irritable with his family.

His memory is good and he comprehends technical subjects well.

He reads and writes for diversion but can do so for only short periods at a time.

In writing letters, he would repeat himself. He had no difficulty in finding words or saying what he wished to say.

When at work he could dictate letters correctly.

13th March 1961: ON EXAMINATION

He still talks freely but is less talkative than he was.

Occular movements full. No nystagmus. Pupillary reactions normal.

Slightly deaf on the left. Weber's Test: Sound referred to the right side.

Finger nose Test well performed. Position sense good with eyes closed. Stands steady with eyes closed.

Facility of movement not quite as good in the Left lower limb as in the Right one.

Deep reflexes brisker on the Left side than the Right.

Plantar Responses: both flexor.

Blood Pressure: 130/90 mm. Hg.

CONCLUSIONS: 1. Psychological State

Although he is inclined to be euphoric and loc-quacious habitually, there is no doubt that his

talkativeness at least in some measure must have been of pathological origin. Certainly any excitability and irritability has been related to his post-traumatic state, as have been such indiscretions and reduced self-control which have led to his difficulty in holding employment.

The state of Depression arose out of adversity and was of a Reactive nature. There is no previous record of any depression prior to the head injury under review.

His tendency to become tired easily is largely psychological. As with his complaint of sleep disturbance, no doubt the depressive element takes part.

2. Physical State

General health is good.

There is residual evidence of the original traumatic weakness of the left side of the body in the increased briskness of the deep reflexes on the left side of the body; and also in the diminished facility of movement in the left lower limb.

Deafness in the left ear is not severe but is permanent. The nature of the disorder is of nervous origin related to damage to the left acoustic nerve. This damage would account for giddiness to, but there

appears to be an element of postural change also in this respect. The noises in his ears are explainable also on the same source.

The origin of the pains in the left lower limb is not certain though it could arise out of brain damage (Central Pain). The burning nature of the complaint is suggestive of this, but it is not continuous as such pains usually prove to be. The implications would be disquieting should such be the case, for no guarantee of their elimination could be made, indeed an increase in their intensity would be possible.

OPINION

Mr. ----- psychological and physical dirorders all arise out of severe and extensive brain injury consequent upon the accident that occurred on 20th December 1958.

He has made quite a satisfactory recovery, but residual and permanent effects remain. It is feasible that in later years these features could become more apparent. Not infrequent with ageing tissues, sites previously damaged manifest diminishing functional activity in comparison with other comparable regions.

Mr. ----- should be able to resume duties such duties such as he undertook prior to the injury.

That he became unsuitable for permanent employment with the same firm in his previous capacity is due to the brain damage.

The possible intervention of Post-Traumatic Epilepsy cannot be discounted.

----------, F.R.C.S. Eng.,

The -------- Hospital for
Nervous Diseases,

Neurological Surgeon, --------- Hospital, London

AGREED

Subject to 1, 2, and 5.

Dr. ----------
Maladies Nerveuses et Psychiques

MEDICAL REPORT

The under-signed, Director of the Neuchatel Medico-Social Services, Director of the Childrens Psychiatric Poli-Clinics and Observation Wards, of the Canton of Neuchatel; specialist for nervous diseases, confirm that I have been treating Mr. ----- born 1922, and living in Neuchatel, ---------- since 11th June 1960.

Mr. ----- suffered on the 28th November 1958 a very serious brain contusion; he was unconscious six weeks. Even now, one can still notice a one-sided neurological syndrome (light hyporeflexia left, disturbances of sense left, noises in the ear left. (Furthermore, the patient suffers from neuro-vegetative disturbances. (Headaches and ticks of the eyes).)

During 1959 the patient lost a very good position. He was employed by a firm of Machine Manufacturers, as export sales manager with full powers and extremely valued. He was also included in a Pension Scheme.

After the accident the patient had difficulties with the Management and attracted attention through

his irritability and abnormal behaviour. Eventually his employers terminated his employment.

In my view his behaviour was due to psycho-organic disturbances, resulting in changes of his character which unfortunately were not diagnosed at this time. (Since the accident the patient who was never before psychiatrically examined suffers from periods of depression.)

It is well known that the psycho-organic syndromes are difficult to recognize at an early stage and only from the Clinical behaviour of the patient can they be identified. Sometimes close relatives, collaborators or domestic staff can give better information than the doctor, who only sees the patient during the consultations.

The notable indications of the commencement of psycho-organic syndromes are as follows:

Increased excitability

Change of the affectivity in the sense of:

Increased sensitivity regarding all kinds of happenings and emotion.

Increased suggestibility or contra-suggestibility

Euphory with abnormal optimism and dimming of power of self-criticism.

All these symptoms were present and had Mr. ----- been examined by a psychiatrist, many of his difficulties could have been prevented. He would probably not have been thrown off his course.

It is impossible that such a serious brain contusion could be suffered without some psychiatric change. It is well-known that patients do not revert in under one or two years to their normal condition even when the prognosis is favourable.

There is no doubt in my mind that Mr. ------ suffered serious damage through the accident on the 28th November 1958, both medically and materially. It is my firm opinion that Mr. ----- lost his employment on account of his changed mental condition which was the direct result of his very serious head injury.

Dr. ----------

NOT AGREED

From: Mr. ----------
Private Consulting Room
The National Hospital
Queen Square,
W.C.1.

TERMINUS 3958

Medical Report on the Case of:

Mr. ----------, aged 36 years,
of ----------
Switzerland

Three weeks before admission into The National Hospital on the 20th December 1958, Mr. ----- was in a traffic accident wherein a bus encountered the near-side of the car in which he was riding. Mr. ----- was seated between two other persons on the back seat of the car; the passenger on his left was killed and the one on his right was pushed out of the off-side of the car. Such was the force of impact that the car was pushed about twenty yards.

Mr. ----- was taken to New End Hospital in a state of unconsciousness, remaining in that condition for two days. Recovery of consciousness was followed by a state of confusion and disorientation of varying degree according to the intensity of accompanying stupor.

Because of the rather variable response of the patient, he was taken to the Whittington Hospital for radiographic investigation by Arteriography. On return to New End he was transferred to St. John's and St. Elizabeth's Hospital, St. John's Wood. (The arteriographic examination did not reveal any distortion or displacement of the cerebral blood supply).

During the third day after injury a period of complete lucidity of short duration occurred. For the next few days steady improvement took place, but fourteen days from the time of injury even greater confusion presented, necessitating heavy sedation. At this juncture lumbar puncture was performed but normal cerebro-spinal fluid pressure was encountered, and analysis of the fluid did not reveal any abnormal constituents.

Sir ---------- now saw the patient in consultation and recommended his transfer to The National Hospital as the existence of a Subdural Haematoma appeared likely.

Mr. ----- was admitted to The Private Floor of the National Hospital on the 20th December 1958. He was much confused, supposing himself to be in Holland, and extremely restless. He was extremely difficult

to control for he attempted repeatedly to get out of bed.

A mild degree of weakness was discernible in the left side of his body, affecting in particular the upper limb especially at the periphery. The deep reflexes of the left side were somewhat increased and the left plantar response was of extensor type.

These physical signs in the presence of variable confusion, stupor and restlessness called for the exclusion of a Subdural Haematoma. Exploratory burr holes failed to reveal any collection of blood and needling encountered the cerebral ventricles at normal depths. Accordingly, cerebro-spinal fluid was replaced by oxygen and radiographic examination made. No evidence of displacement, distortion or undue distension of any part of the ventricular system was forthcoming.

Continued variability between restlessness with marked confusion and a stuporose state led one to assume the presence of vascular thrombosis associated with oedema of the brain of varying intensity. No doubt this was consequent on Contusion of the Brain due to the initial injury.

In order to maintain control of restlessness it was necessary to apply heavy sedation. Meanwhile

deterioration in his conscious level took place, a degree of stupor ensued not to be accounted for by the dosage of drugs in application. Weakness in the left side increased to the extent that little movement took place therein even on the application of painful stimuli.

Throughout the whole of this time the patient was incontingent of urine. This precluded due measurement of the quantities of urine excreted, but the difficulty of maintaining adequate dryness of the bed suggested the possibility of excessive secretion (Diabetes Insipidus).

Stimulation by injection of Caffeine Sodium Benzoate and the administration of Dexedrine brought about a steady improvement in the level of consciousness with reduction of the confusion and disorientation and diminution of restlessness. Emotional lability became manifest in his becoming tearful at times at times, although rational. Finally urinary continence returned, but not fully before the 11th of January 1959.

General restoration of normal activity, insight and orientation followed on this, permitting his discharge from the Hospital on the 25th January.

He has of course complete amnesia for the time

of injury, but a final assessment of the durations of both pre- and post-traumatic amnesia is required. Unconsciousness for two days initially indicates a profound degree of disturbance of cerebral function, and the prolonged mental disturbance indicates somewhat extensive injuries.

It was considered wise to defer Mr. -----'s return to Switzerland for a further fortnight. Following his return a month of quiet inactivity was advised before any suggestion of a return to business activities be mooted, say sometime about the middle of March. Even then, restricted hours of work would be advisable until at least after Easter 1959.

---------- F.R.C.S., Eng.,

The -------- Hospital for Nervous Diseases, London

20th, April, 1959

APPENDIX NO. 3

MEDICAL REPORT

Mr.----------
M.B., Ch.B., F.R.C.S.

November 5th, 1962.

Re: Mr. ---------, aged 58.
Employed as a moulder by

HISTORY:

Mr. ----- informs me that on the 11th April 1962 he received injury to his right leg when a moulding box fell out of a crane and struck his leg a glancing blow down the shin. This caused a laceration extending the whole length of his leg and he was taken to the Rochdale Infirmary. His leg was stitched up and he continued to attend as an out patient for some twelve weeks, and after this he has continued to attend his own doctor who has not yet signed him off as being fit for work.

PRESENT COMPLAINTS:

He complains today of discomfort in his leg when he walks about or stands for any length of time and also some swelling particularly round the right ankle. He is hoping to return to work in the near future.

EXAMINATION:

On examination there is a twelve inch scar running down the front of the right leg below the knee and running around towards the outside of the calf. There is an extensive pigmented area around this scar indicative of the extent of the grazing which occurred. There is also some oedema of the right ankle. The right leg generally below the knee is slightly swollen as compared with the left. There is a full range of movement of knee and ankle.

OPINION:

At the time of this accident Mr. ----- sustained a laceration to his right leg which, although soundly healed, is responsible for some degree of swelling of his leg. This should in course of time become normal and I think he should soon be able to return to his work.

(Signed): ----------
F.R.C.S.

Solicitor

MEDICAL REPORT

MR. ----------
M.B., Ch.B., F.R.C.S.

May 7th, 1963.

Supplementary report on
Mr. ---------

Mr. ----- informs me that he returned to work on the 11th November 1962 but on lighter work than his pre-accident job which he says involves kneeling and also a good deal of climbing. He says he is not able to do this because he has some discomfort and pain in his right leg. He also says that the leg swells at night although by the time he has rested overnight the swelling has disappeared. He thinks that improvement is continuing to occur because the discomfort he is experiencing is gradually becoming less. His work, be it light or heavy, involves his being on his feet practically the whole of the day.

EXAMINATION:

On examination the previously noted scar is present as before, and although the pigmented area is less the scar is still thin but does not appear to be adherent to the underlying bone. There is a

little tenderness at the lower part of this scar. There is a good range of movement of knee and ankle and no oedema on examination today.

OPINION:

The condition of Mr. -----'s leg has improved as I thought it would so that he is now able to return to his work. I still feel that in due course he will be able to do his ordinary work and perhaps a further three months or so should see him back at it. His present symptoms are, I think, due to the tender scar which does not stretch as easily as normal skin.

(Signed): ----------
F.R.C.S.

APPENDIX NO. 4

FROM MR. -----

24th March, 1961.

MEDICAL REPORT RE: ----------
aged 28, ----------

DATE OF ACCIDENT: 7.4.60.

OCCUPATION: Steel Erector.

HISTORY:

------- was admitted to Middlesbrough General Hospital on 7.4.60. It was stated that he had fallen a distance of 20 feet. He was unconscious on admission. Examination showed the following injuries:

(1) Fractures of the skull.

(2) Fracture of the right thigh bone.

(3) Injuries to both wrists with dislocation of the carpal bones.

(4) An injury to the right side of the chest with surgical emphysema and fractures of several ribs.

(5) Fracture of the right ileum bone.

------- was treated in the Neuro-surgical ward under the care of Mr. -------. His general condition was very critical for a time and he removed the immobilisation from his wrists and attempted to remove

the splint from his right leg. When his condition had improved a little, the fracture of the shaft of the femur was treated by intramedullary nailing on 20.4.60. He was discharged to Dunstan Hill Hospital for rehabilitation on 11.7.60. He was re-admitted to hospital on 22.1.61. the intramedullary nail was removed from his right femur and on 30.1.61. operations were carried out on both wrists. In the left wrist, the proximal row of carpal bones was excised and in the right wrist the dislocated lunate bone was excised.

At the present time ------- is attending hospital for supervision and may require further rehabilitation.

EXAMINATION:

Head - ------- is still a little facile, which appears to be the result of his head injury.

There is a healed tracheotomy scar.

Right wrist - there is a healed 2½" scar on the back of the wrist. Only a few degrees of movement are possible. Full movements are present in the fingers but the grip is weak.

Left wrist - ------- did have numbness in his hand before the recent operation but this has disappeared. There are 3½" anterior and posterior scars. The wrist extends to the straight position, flextion is present to 10 - 15 degrees. Finger movements are full.

Right leg - There are 2½" scars above the trochanter and a 7½" scar over the outer side of the femur. The hip lies slightly externally rotated and there is some tenderness over the hip joint. Abduction movement is free, flexion movement is present to about a right angle. Knee range - 180/175, left knee 180/45.

OPINION:

------- sustained the severe general injuries set out in the first part of this report.

His fractured femur is united and he has regained a good range of movement in his right leg. There is considerable restriction of movement in both wrists, and although he has full movement in his fingers, the grip of both hands is very weak.

From the point of view of the injuries to his right leg and both wrists I consider ------- is permanently unfit for work as a steel erector. In addition to the disability from the leg and wrists he has the resulting disability of his very severe head injury, but as he has been treated for this condition throughout his stay in hospital by Mr. --------, I feel it would be wise to have Mr. ------'s opinion with regard to the prognosis in this case.

As stated above, ------- is certainly unfit for

full work as a steel erector. He will have to confine his activities to work at ground level and he is not yet fit for re-training of any sort until he has had a further period of rehabilitation at a Neurological Rehabilitation Centre. There would appear to be a definite personality change in this man and his whole future outlook must remain very problematical at the present time.

(Signed): ----------

M.B.,Ch.B.,F.R.C.S.E.
Consultant Orthopaedic Surgeon.

FROM

MR. ------- ------

15th May, 1962

MEDICAL REPORT RE: ------

I re-examined this man on 11.5.62. ------ states that he is no longer attending hospital. He has recently seen Mr. ------ and Dr. -------. He says he has told Dr. ------- that he does not want to see him again as he does not want to take tablets. He would like to take a job as a hospital porter.

His left side still feels weak. Both wrists feel weak and sensation in the left hand is poor. His sense of touch is poor and he says he cannot play his piano accordion on this account. His right leg aches a little and he has some pain round the right hip.

During examination ------ is very talkative, but he says he always talked a lot and always enjoyed a good joke.

EXAMINATION:

Right hip and leg - shortening 3/4".

The right leg is definitely externally rotated.

In the right hip bending is limited to a right angle, sideways movement is full. Internal rotation is limited. External rotation is full.

Knee range - full.

There is thickening in the mid-shaft of the femur.

The operation scars over the right buttock and the outer side of the right thigh remain soundly healed.

Left wrist - The anterior and posterior operation scars are soundly healed. Backward movement of the wrist - 10 degrees, forward movement - 25 degrees. Finger movements are full. The grip of the left hand is better than the grip of the right hand. There are no definite sensory changes by ordinary examination and ------ can feel light touch in the form of cotton wool and can differentiate pin-prick.

Right wrist - The scar on the back of the wrist remains soundly healed. Backward movement - nil. Forward bending - 20 degrees. Finger movements are full but the grip is weak.

OPINION

------ sustained the severe general injuries noted in my previous report of March, 1961, namely, fractures of the skull, fracture of the right thigh bone, fracture dislocations of both wrists, an injury to the right chest with surgical emphysema and fractured ribs and a fracture of the right iliac bone.

------ has been seen by Mr. ------ and Dr. ------ from the point of view of his head injury and the sequelae of his head injury and I shall leave that point to them.

In the right thigh the fractured femur is soundly united with slight shortening (3/4") and with some external rotation of the lower leg. ------ has regained good movement in the hip and knee and function in the right leg is satisfactory. Were this his only injury he should be able to return to heavy work although free climbing would be difficult.

In both wrists movements are limited and the grip is weak, and sensation may be a little impaired in the left hand. From the point of view of his wrist injuries he is permanently unfit for work as a steel erector and will have to be retrained for some job at ground level. His training will depend on an assessment of his mental capacity and this point will be dealt with by Mr. ----- and Dr. -------, but I should have considered him unsuitable for a post as a hospital porter, purely from the physical point of view as he would not be able to do the lifting necessary on account of the wrist injuries. This is the job which ------ himself says he wishes to do.

(Signed) ----------

M.B.,Ch.B.,F.R.C.S.(Ed.)

Consultant Orthopaedic Surgeon.

FROM MR. ------- ------

11th May, 1961.

----- ----------
Solicitor,

Dear Sir:

Re: ----------

We thank you for your letters of 18th April and 4th May 1961 about this patient and have pleasure in submitting our joint report on Mr. ------.

It appears that before his accident on 7th April 1960 Mr. ------ was well and healthy and appears to have been a reasonably well-adjusted personality, if somewhat rough and ready and mildly aggressive. He was thoroughly interested in football and captained the Middlesbrough Boys Football Team. At one point he was on the books of Hull City Football Club but he was never really interested in professional football and preferred the amateur game. His parents are both Lithuanian but he himself was born in Middlesbrough. Since leaving school he had always worked at the ---------- and he was a leading hand steel

erector just before his accident. Since the accident he has not worked. Between 1949 and 1952 he served in the R.A.M.C. as a National Serviceman and reached the rank of corporal. In 1955 he was married and he has one daughter aged three-and-a-half years.

Mr. ------ was admitted to the Neurosurgical Unit of the Middlesbrough General Hospital on 7th April 1960 and we understand that he had fallen a considerable height at work. At the time of admission he was very deeply unconscious and had a wound 1½" long on the right temporal region of the scalp. He was also bleeding from the right ear. X-ray examination showed multiple fractures of the skull, a fracture of the right side of the pelvis, a fracture of the shaft of the right femur, bony injuries to both wrists and fractures of the right 8th and 9th ribs. He also had surgical emphsema over the right side of the chest. He was shocked and given a blood transfusion. After being given three and a half pints of blood his condition had improved very considerably but his temperature rose to 103° F. and he had to be treated by cooling. On 8th April his general condition was a little better but he was still deeply unconscious. As he was having considerable difficulty with breathing

a tracheostomy was performed. At the same time the scalp wound was closed. On 11th April it became apparent that he had a paralysis of the left side of the body. On 19th April he began to speak an occasional phrase and on one occasion was heard to say that he felt "a bit rough". Most of the time however then he was lying speechless and responding only to painful stimuli. The paralysis of the left side of the body was then less marked but still quite obvious. On 20th April an operation was performed on the right femur, under the direction of Mr. ----------, in the Orthopaedic Unit and on 21st April consciousness was regained. From then on he made steady progress but was extremely emotional and noisy. By 25th May this noisy, restless period appeared to have come to an end. It was noted at that time that there was marked weakness of the muscles of the left arm, shoulder, hand and left leg. The left plantar response was extensor in type. He was then speaking well and appeared to have settled down in the ward but was still unreasonable in his demands. He expected, for instance, to be allowed to get up and walk about despite the fact that he had a fracture of the right thigh bone. By the beginning of June he was much more co-operative and sensible and was

able to recall events up to a period of two weeks before his accident. On 11th July 1960 he was transferred for rehabilitation to Dunston Hill Hospital, Gateshead. At that time he was walking a little on his own but still had obvious weakness of the whole of the left side of the body. His mood was very variable and it alternated between periods when he was depressed and others when he became extremely garrulous and laughed in an uncontrollable fashion. He remained at Dunston Hill until 23rd July when he went home. At that time it was noted that his paralysis had become less marked and that mentally he had improved considerably. However, his mood still remained euphoric at times alternating with periods of depression and moodiness.

The position now, from the neurological and psychiatric standpoint, is that he still has some weakness of the left arm and leg but this appears to be improving and we expect further improvement to take place. However, complete recovery is most unlikely. We understand that the aspects of this case concerned with his limb fractures, have been dealt with in a report to you by Mr. -------- so we do not propose to comment on them beyond saying that he is still obviously fairly severely incapacitated

as a result of the injury to the right thigh and both wrists. He has a well healed tracheostomy wound and the scalp wound has also healed well. He tells us that there has not been any alteration in sexual drive since the accident but he says that he is losing patience with the physiotherapy treatment which he is receiving as he feels that there is not much improvement taking place and he is still having pain in his hip. He is euphoric and tends to be mentally disinhibited. Apart from these features he displays no gross psychiatric symptoms but this man has undergone some degree of personality change following his accident without however evidence that his intellect has suffered. This personality change is manifested mainly by these sharp alterations in mood which his family are finding very trying. He is disturbed by the limitations placed upon him from his physical injuries, particularly the weakness in his wrists. As he was previously of good personality, one would hope that he will once again make a satisfactory social and domestic adjustment and in this respect we feel that he will certainly benefit from a course of rehabilitation which we are in the process of arranging for him. He possesses good insight and will avoid things, such as excessive drinking, which

would aggravate his mental condition. We feel that his rehabilitation, from the psychiatric and neurological point of view, is being considerably retarded as a result of his physical limitations and that his depression and emotional liability will persist as long as he is afflicted in this way. If it is felt that there will be persistent disability as a result of his injuries then we feel that it is unlikely that complete recovery, from the mental point of view, will take place. However, he still possesses a good deal of drive and we do not wish to offer a gloomy prognosis at this stage. We suggest another report at the end of this year.

Yours faithfully,

(Signed): ----------
Consultant Neurosurgeon

(Signed): ---------- M.B.,B.S.,D.P.M.

Consultant Psychiatrist

FROM MR. ----------

7th May 1962.

Solicitor,

Dear Sir:

Re: ----------

We thank you for your letter of 1st May 1962 about Mr. ------ and we again examined him jointly on 5th May last. Since the time of the last report we have been seeing him in our respective out patient clinics. The following is our up to date report on him.

Mr. ------ was in Roffey Park Rehabilitation Centre for nine weeks in the summer of 1961 and he tells us that he thinks his stay there did him the world of good. He says that it helped him to see people who were worse than he was and made him feel that he wished to help others instead of thinking about himself. The absence from his wife and home also encouraged his sense of responsibility. He says he feels less depressed and that he feels as if a great load is being lifted from his mind by knowing that there is a prospect of settlement of

the compensation case. He says that his temper is better and that he has given up taking Phenobarbitone as he does not wish to become habituated to drugs. He is thinking about jobs which might be possible for him and thinks that with his R.A.M.C. background he could work as a hospital porter. He tells us that he feels able to do a job and wants to get better, not liking to be regarded as 100% disabled. A further point in the history which we had not heard before was that he apparently used to play an accordion in public houses before the accident. Now, he is unable to do so as he cannot feel the bass keys accurately with the left hand. He says that he still has a pain every day at the back of his head like a hangover and he also has pains in the wrists, the right thigh, hip and buttock. Before the accident he could do the Daily Mirror crossword in ten minutes but cannot now complete it, and he says he still has difficulty in remembering things. He admits to some falling off in sexual powers and decrease in libido. He tells us that his speech is improving but he occasionally has difficulty in speaking. Mr. ------ says that he does not want to go on attending the psychiatric clinic at Berwick House, Middlesbrough as he feels that other people have more need of treatment than he does. He says that he could not possibly

go back to work as a steel erector as his wrists are weak, stiff and painful. He is now able to walk two to three miles but always gets a pain afterwards in the right thigh. Mrs. ------ has been interviewed and she reports that her husband is still very bad tempered and has "tantrums". She also reports marked decline in libido on his part and says that his speech becomes slurred at times.

On examination, we note that movements of both wrists are restricted and appear to cause pain. There is some shortening of the right leg and Mr. ------ limps as he walks. There is weakness of the left arm especially on extension of the elbow. The left leg is nearly as strong as the right. He is extremely euphoric and is very garrulous.

We feel that there is still evidence of considerable organic change in the cerebral hemispheres as a result of the head injury. This is showing itself in irritability, euphoria, lessening of his sexual powers and a tendency to talk continuously. From our observations of this man it is clear that he is still showing sharp changes in his mood, alternating between depression and elation and this must be very trying for his family. We do not wish to go into detail regarding the injuries to the hip

and wrists, which are properly the province of an orthopaedic surgeon but it is clear that he still has a severe physical disability as a result of these fractures and dislocations and the number of occupations in which he could be employed is obviously very limited as a result. Despite his own feelings on the matter, it is quite clear that he could not work as a hospital porter as he would be unable to lift stretchers or other weighty objects. The physical restrictions placed on him as a result of these injuries still undoubtedly continue to increase his irritability and feeling of resentment. As two years have now passed since the accident we consider that these personality changes will be permanent although they may become less marked as time proceeds. The only sort of work for which he is capable is an occupation involving very little mental effort and not making strenuous physical demands.

Yours faithfully,

(Signed): ---------- F.R.C.S.
Consultant Neurosurgeon to

(Signed): ----------, M.B.,B.S.,D.P.M.
Consultant Psychiatrist to

IMPARTIAL MEDICAL TESTIMONY

PLANS IN USE

PLANS	What Types of Cases Are Included In The Plan?	Panel Members Selected By	Are The Names of Panel Members Kept Confidential?	Who May Request Impartial Expert?	Who Decides An Impartial Expert Is To Be Used?	Who Controls Assignment of Impartial Expert to a Case?	How Many Impartial Experts Are Used in One Case? (A)	Are the Experts Assigned in Rotation?	May Counsel Reject the Proposed Expert? If so, how many Alternates are Offered?	May the Parties Also Use Their Own Medical Witnesses?	Does the Impartial Expert get Plaintiff's & Defendant's Medical Reports?	May the Impartial Expert Be So Described to the Jury?	May the Impartial Expert Be Cross-Examined?	What Fees May Be Charged By Impartial Experts, and Who Pays Them?
NEW YORK (Rule 21 of the Appellate Div., Supreme Court, First Dept., effective December 1, 1952)	Any Personal Injury (except Alleged) Medical Malpractice)	N.Y. Academy of Medicine and N.Y. County Medical Society	Yes	The Judge or Either Party	Judge	Deputy Clerk of the Supreme Court	1	Yes	Yes — One	Yes	Yes	Yes	Yes	The Doctor's Usual Fee - Paid by the Court
PHILADELPHIA (Rule 22 of the U.S. District Court for the Eastern District of Pennsylvania)	Any Personal Injury	The Medical Society of the State of Pennsylvania	Yes	The Judge or Either Party	Judge	Deputy Clerk of the U.S. District Court	1	Yes	Yes — One	Yes	Yes	Yes	Yes	Doctor's Usual Fee - Approved by the Court and Paid by the Parties Equally - (C)
CHICAGO (Rule 20 of the U.S. District Court for the Northern District of Illinois)	Any Personal Injury (except "Medical Professional Liability")	The Illinois State Medical Society and The Chicago Medical Society	Yes	The Judge or Either Party	Judge	The Illinois State Medical Society	1	Yes	Yes — One	Yes	Yes	Yes	Yes	Doctor's Usual Fee - Paid by Plaintiff and/or Defendant - As Ordered by the Judge
BALTIMORE (Discovery Rule 5-1 of the General Rules of Practice & Procedure of the Superior Court of Baltimore City)	Any Personal Injury	The Medical & Chirurgical Faculty of Maryland	Names are "Not secret but are not published"	Either Party	Judge	The Secretary of the Medical Society ("Faculty") Supplies Panel	1	No — The Names of All Three Panel Members Are Given to the Parties - (B)	Yes — One	Yes	Yes — If He Requests Them	Yes	Yes	Doctor's Usual Fee - Guaranteed by the Party Requesting the Examination
UTAH (Sec. 35-2-57 of the Occupational Disease Law & Sec. 35-1-77 of the Workmen's Compensation Law of the State of Utah)	Ocupational Diseases & Workmen's Compensation Only	Utah State Medical Association	Yes	The State Industrial Commission	The State Industrial Commission	The Medical Consultant to The State Industrial Commission	3	Yes — (Except Panel Chairman)	Yes — One	Yes	Yes	No Cases Have Been Tried	Yes	The State Industrial Commission
CLEVELAND (Rule 21A of the Court of Common Pleas of Cuyahoga County, Ohio)	Any Personal Injury	The Academy of Medicine of Cleveland	Yes	The Pre-Trial Judge, After Consulting Counsel for the Parties	Judge	Academy of Medicine	3	Yes	Yes — (Under Some Circumstances) — One	Yes	Yes	No	Yes	Fees Fixed by Academy of Medicine - Aproved and Paid by the Court
LOS ANGELES (Sec. 1871, California Code of Civil Procedure, as Amended effective September, 1959)	Any	Los Angeles County Medical Association	Yes	The Judge or Either Party	Judge	Two Judges of Superior Court Los Angeles County Administer the Plan	1	Yes	Yes — No Limit Specified	Yes	Yes	Yes	Yes	Fees fixed by scale of Calif. Industrial Accident Commission — Paid by Party Requesting Expert, or by Los Angeles County if the Judge made Request

(A) For each medical specialty involved in the alleged injury.

(B) An additional expert is assigned to the panel in rotation to replace the one selected.

(C) The Judge may, in special circumstances, direct other division of this expense.